REPORTS OF CASES

ARGUED AND DETERMINED

720

IN THE

COURT OF APPEALS

OF THE

STATE OF NEW YORK

WITH

NOTES, REFERENCES, AND AN INDEX.

BY EMERSON W. KEYES,
Counselor-at-Law.

ALBANY:
WEARE C. LITTLE,
LAW BOOKSELLER, No. 525 BROADWAY.
MDCCCLXVII.

JUDGES OF THE COURT OF APPEALS.

1864.

HIRAM DENIO, *Chief Judge.*
HENRY E. DAVIES,
WILLIAM B. WRIGHT,
HENRY R. SELDEN.

JUSTICES OF THE SUPREME COURT

WHO WERE JUDGES OF THE COURT OF APPEALS IN 1864.

DANIEL P. INGRAHAM,
HENRY HOGEBOOM,
JOSEPH MULLIN,
THOMAS A. JOHNSON.

AN ACT IN RELATION TO THE JUDICIARY,

Passed in 1847 (Laws 1847, Ch. 280).

"§ 5. The judge of the Court of Appeals elected by the electors of the State, who shall have the shortest time to serve, shall be the chief judge of said court.

"§ 6. Four justices of the Supreme Court, to be judges of the Court of Appeals, shall every year be selected from the class of justices having the shortest time to serve; and alternately, first, from the first, third, fifth, and seventh judicial districts, and then from the second, fourth, sixth, and eighth judicial districts; and shall enter upon their duties as judges of the Court of Appeals on the first day of January, and serve as judges of said court one year."

REPORTER'S NOTE.

It is generally well known that the Reports of decisions by the Reporter of the Court of Appeals, two volumes a year, comprise only about two-thirds of the cases adjudicated by that body.

Doubtless the best is done that can be, in making the selection known as the New York Reports. But the difficulty, an insuperable one, is to make a selection where all are, or may be, equally important and valuable to the profession and the public at large.

The non-reported cases, forming so large a proportion of the whole number, cannot fail to embrace principles, and conditions to which established principles are applied, quite as novel and important as those found in the Reporter's volumes.

It is clear, therefore, that no absolute knowledge, or safe presumption concerning the LAW, can be predicated upon an examination, however thorough, of but a portion of the cases adjudicated by our highest court. Every earnest lawyer will desire to see and judge for himself whether the cause he has in hand finds its parallel in any cause already determined; and this he cannot do while any considerable number of those determined causes are not reported.

At the same time, care has been exercised not to encumber these reports with decisions involving only well established principles, or such as are applied to cases analogous to those previously reported.

EMERSON W. KEYES.

ALBANY, *November*, 1867.

TABLE OF CASES.

UNREPORTED CASES

DETERMINED IN THE

COURT OF APPEALS

OF THE

STATE OF NEW YORK.

STEPHEN CLARK and others, Respondents, *v.* THE MAYOR, ETC., OF NEW YORK, Appellants.

An offer to pay what is due, on a contract, provided the other party will give a release for all damages, etc., is not a tender of payment.

When the contract has been completed, and the balance due thereon is withheld to compel a release of other claims, the plaintiff has his action for the recovery.

Where, by the terms of the contract the commissioners were authorized to make any alterations in the "form, dimensions, or materials of the work," a resolution ordering the excavation to cease at a certain point, or to go no farther is not a violation of the contract.

Appeal from General Term.

THIS action is brought to recover a balance for work done under a contract between the parties for the construction of section 96 of the Croton Aqueduct. This section included the reservoir. The plaintiff also claimed damages for having been prevented from excavating rock from the northern section of the reservoir.

The contract required the plaintiffs to furnish the materials and perform all the labor necessary to construct section 96 of the Croton Aqueduct. In doing the work the plaintiffs were to receive for rock excavation $1.00 per cubic yard, and for earth excavation fourteen cents. The contract bound the contractors to perform the work as stated in the specifications, "but any alterations in the form, dimensions, or materials of said work, which may be directed in writing by the commissioners or the engineer, shall be made by the con-

tractors as directed," and to prevent dispute it was agreed that the engineer should in all cases determine the amount or quantity of the several kinds of work to be paid for under the contract, and that the engineer should decide every question which could arise relating to the execution of the contract on the part of the contractors, and his estimate and decision should be final and conclusive.

In the specification the northern section was described to have twenty feet depth of water, and the southern twenty-five feet depth.

In May, 1840, the water commissioners adopted a resolution that the construction of the northern division of the reservoir be suspended, except so far as the excavation of rock and earth required in the adjacent section may be considered as part of the aqueduct. This was communicated to the contractors.

On May 27th the chief engineer notified the contractors that they were to carry on the excavations so far as may be necessary to obtain materials for the work on the southern division.

In July, 1840, another resolution was passed by the water commissioners directing the contractors to proceed with the construction of the northern division, except that the rock excavation be carried no further than may be necessary for obtaining materials to complete the work on the section.

It does not appear whether or not this resolution was served on the contractors, but it was proved that the substance of the resolution was acted upon, and the assistant engineer testified that he heard of the substance of that direction as early as 1839, and he understood no rock excavation was to be made simply for making room.

In 1842 the contractors notified the water commissioners that their work had been completed for several weeks, and asking payment of the balance remaining unpaid. The engineer also testifies that he sent the resolution of the commissioners to the plaintiffs.

The plaintiffs objected to such directions as to the rock excavation.

The judgment now appealed from allows to the plaintiff three items of recovery. 1. For balance due of $3,483.49 interest. 2. Damages for not allowing them to excavate the northern section of the reservoir. 3. For money paid to obtain the use of a piece of land during the work.

From this judgment the defendants appealed to the General Term who affirmed the judgment. The defendants now appeal to this court.

C. O'Conor, for the appellants.

John H. Reynolds, for the respondents.

INGRAHAM, J. There is no doubt as to the correct amount of the balance for work done under the contract. This amount was certified to by the engineer, and was retained by the commissioners as part of the ten per cent which, by the contract, they were authorized to retain. For this amount, application was made to the president of the board, who offered to pay it on condition that the plaintiffs would give a receipt in full. This was refused, and the payment by the commissioners was then refused.

After this refusal by the commissioners to pay, on the ground that the plaintiffs would not release their claim for damages, it was not necessary that the plaintiffs should resort to any other mode to obtain payment. The contract was conceded by both parties to be finished, and when the balance admitted to be due was witheld for the purpose of compelling a release of other claims, the plaintiffs had a right to resort to an action for its recovery.

There is no good ground shown why the plaintiffs should not recover this balance with the interest.

Nor was there any good answer to the plaintiffs' claim for one hundred dollars paid to Dr. Wagstaff.

The commissioners passed a resolution that one hundred dollars be allowed to the contractors toward procuring certain land privileges necessary to the prosecution of the work. The money was paid by the plaintiffs for the commissioners and at their request. It was in no way included in their

contract, or subject to its provisions, but was to be paid in the same manner as any money paid by one party for the benefit of another and at his request.

The third item is for damages for not allowing the commissioners to complete their contract.

This embraces two questions, first, whether they were entitled to recover any damages for the acts of the commissioners, and second, whether if such damages could be recovered, the plaintiffs could recover interest on such damages.

Upon the trial the judge charged the jury that "the discontinuance of the work on the northern division was in law a violation of the contract, and that the plaintiffs were entitled to damages."

"He also charged that the plaintiffs were entitled to interest on their damages for the work so omitted in point of law, such interest to be computed from the time at which the plaintiffs would have received their payment in case they had performed all the work according to the original plan." The right to recover damages depends upon the construction put upon the acts of the commissioners in regard to the northern section of the reservoir. They directed that no rock should be blasted after a certain period from that portion of the reservoir excepting what the contractors might want for other portions of the work. This is claimed by the plaintiffs as suspending their work on that section. I am not able to agree with that view of these resolutions. The commissioners had power to make alterations in the form, dimensions or materials of the work. They made such alterations by directing that the northern section should not be excavated any deeper than it was at the time of the passage of the resolution, and they afterward modified that by another resolution directing them to proceed with the work on the northern division according to the plans, except that the rock excavation is to be carried no further than might be necessary to complete the work on section 96.

The receipt of the last resolution is disputed, but the weight of evidence is that it was communicated to the plain-

tiffs and their letter to the commissioners asking for payment for the balance, strengthens that conclusion.

These two resolutions taken together will bear no other construction than that the commissioners determined to reduce the depth of the reservoir. That it had some depth and was capable of containing water is apparent from the fact that it was filled after the contract was finished.

I suppose it can hardly be denied, that the commissioners might, under the power secured to them in the contract, have reduced the size of the northern division by cutting off one block or more, or less, and directing the contractors to finish the residue according to the contract. And if such piece so excluded from the work contained all or more of the rock excavation, it would afford no ground for damages on that account. I see no difference between such an alteration and one made in the depth. Suppose the commissioners had discovered that by excavation of the rock to the depth proposed, they would have opened the rock to fissures through which the water would have passed off from the reservoir, would any one doubt their power and duty to have ordered that the rock should not be removed. And if for any other cause, they deemed it expedient not to alter the rock bottom of the reservoir I see no reason why they had not the same power. It was a matter left to their discretion and judgment to make alterations in the form and dimensions of the aqueduct. By dimensions must be understood the extent, length, breadth and depth of the work. Any of these portions they had a right to alter. They did so by diminishing the depth; a power they had a full right to exercise, and one which strictly comes within the reservation in the contract.

When this case was before this court on the former appeal some of the judges placed their opinions upon the ground that the work on the contract was suspended and that this was not within the reservation.

This was not the case. The contract was not suspended nor did the work cease. The very resolution under which they acted allowed the work to go on, even on the northern section so far as was necessary to complete the residue of the

work, and the same learned justice conceded that they might have altered the plan so far as to exclude the northern division altogether from the work. I am at a loss to conceive how a direction not to take any more rock from the bottom is less of an alteration in the dimensions of the work or how leaving the bottom of the reservoir uneven where rocks projected instead of having them cut down to an even surface, is not more clearly an alteration than the other. Such must have been the conclusions of the plaintiffs when they wrote the letter saying "our work having been completed for several weeks, etc."

This view of the main question in the case renders it unnecessary to inquire whether, if the plaintiffs were entitled to recover damages, they could have interest on the amount of such damages. If, however, I should differ from my brethren on that branch of the case it is proper that I should express an opinion on the claim for interest.

Upon this branch of the case I concur with Judge SELDEN in the opinion delivered by him viz.: that the plaintiffs if entitled to damages are not entitled to recover interest thereon.

For the cause first stated however I am of opinion that the judgment should be reversed, unless the plaintiffs remit the amount allowed for damages for breach of the contract and the interest thereon, and a new trial should be ordered. If such amounts are remitted the judgment should be affirmed for the residue.

All were for reversal unless interest was deducted. HOGEBOOM, INGRAHAM, MULLIN and DENIO, were all against plaintiffs on damages.

JOEL TIFFANY, *State Reporter.*

HORATIO N. WALTON, Administrator, etc., Appellant, v. SARAH J. WALTON, Executrix, etc., Respondent.

The administrator is entitled to the possession of the assets of the intestate, and may maintain an action for their recovery. He is the owner in trust for the purpose of administration.

In an action against an executor to recover such assets as come into the hands of his testator, and remained in his hands at the time of his death, it is unnecessary to allege in the complaint that such assets ever came into the hands of the executor. It is sufficient that they came into the hands of his testator, and were unadministered at the time of his death.

Even where it is shown that the assets have come into the hands of the executrix, it is proper that the action to recover the same, should be brought against her in her representative capacity.

HOGEBOOM, J. If this case turns upon the allegations in the complaint, independent of those contained in the annexed schedule, I have no doubt that the action is well brought, and I do not see that they are so far varied by the contents of the schedule, that they should alter the result at which we should otherwise arrive. Those allegations are explicit, that William B. Walton had at his death, in his hands, a large portion of the assets of Jonathan Walton unadministered, that the plaintiff has been duly appointed administrator of such unadministered assets, and the defendant has been duly appointed and qualified as executrix of the last will and testament of William B. Walton deceased, and refuses to account for such unadministered assets.

Prima fâcie and unexplained, I do not see why this does not make out a perfect cause of action in favor of the plaintiff against the defendant. As there is no averment in the complaint independent of the schedule that these assets have been collected, nor in either the complaint or the schedule that the debts and expenses of administration of the estate of Jonathan Walton have been defrayed, there is nothing to show but that these assets are absolutely needed for such purpose, and they can only be properly applied to that object by the duly appointed legal representative of the estate of Jonathan Walton deceased. Independent of this, and for all legal pur-

poses, the plaintiff is the sole legal representative and possessor of the unadministered assets of said deceased, and is entitled by law to the custody of the property and the possession of the assets for the purpose of administration.

He may bring suits to recover the property against any person in possession of it, trover or replevin, if it exist in specie in the condition it was at Jonathan Walton's death, or assumpsit or other appropriate action if it has been converted into money.

It may well be presumed from the allegations in the complaint, that the unadministered assets are in their original condition, that is, in the shape they were at the death of Jonathan Walton. If so, there does not seem to me a possible doubt that the plaintiff is entitled to them from any and every person in whose possession they may be. They belong to the plaintiff as owner, owner in trust it is true, for the purpose of administration, but nevertheless owner in fact. They are unadministered assets, they require administration, and no person in the world can perform this office upon them except the plaintiff.

Indeed, if they have been rightfully or wrongfully converted into money, they are nevertheless unadministered assets of Jonathan Walton deceased, so charged to be in the complaint, and so admitted to be by the demurrer, and therefore rightfully belonging to the plaintiff, and the plaintiff alone. Even if they have been rightfully converted into money by the executional act of William B. Walton, this is but a partial administration of them, they have not been fully administered, we are bound to assume that they require further administration, for they are charged and admitted to be unadministered assets, and in the face of such an admission, we are not permitted to say, that they acquire no further act of administration. They may be absolutely indispensable to pay debts of Jonathan Walton deceased, and no one can employ them legitimately for such a purpose except the plaintiff. Whenever, therefore they are found, in whomsoever's possession they may be, such person is bound to deliver them over into the possession of the plaintiff.

Regarding this right of the plaintiff, therefore, as absolute and undeniable, it seems to follow as a necessary consequence, as has just been stated, that every person in whose possession they may be, is bound to deliver them up, or account therefor, and therefore that the defendant is in no legal condition successfully to resist a demand of the same. But conceding the plaintiff's right to the possession of unadministered assets, it is argued that the action is not well brought against the defendant for three reasons:

1. Because William B. Walton was, before his death, rightfully in possession of them, rightfully converted them into money, if he did so convert them, and rightfully retained them for the purpose of paying debts, and legacies, and distributive shares of Jonathan Walton's estate. 2. Because there is no allegation in the complaint that these assets in whatever shape they may be, ever came into the personal possession, custody, or control of the defendant. 3. Because if they are in the defendant's possession, the action should be against her personally, and not as representative of the estate of William B. Walton deceased.

1. It may and must be conceded that William B. Walton, as executor of Jonathan Walton, had a right to the possession of the assets; a right to convert them into money, and a right, up to the period of his death, to appropriate them to all legitimate purposes of administration of the estate. But this latter office he had not performed, and if he had converted a portion of the assets into money he had only partially administered these assets, and assets are unadministered in the sense of the law until the whole work of administration upon them is consummated. Administration of assets implies such a complete disposition of them as not only to collect them from the debtor of the estate—if they are in that condition—but, finally, to place them in the hands of the creditor, legatee, or distributee to whom, after undergoing the process of administration, they finally belong. As before stated, they had not undergone this latter process; and we are obliged, in the state of facts in which the parties have presented the case to us, to assume that the assets required

further administration. While, therefore, it might safely be conceded that William B. Walton might rightfully retain the assets in his hands, even up to the period of his death, for the purpose of paying debts, legacies, and distributive shares, that right ceased at his death. It did not devolve upon his executor, but upon his successor in the trust; it did not go to the defendant, but to the plaintiff. The plaintiff, and not the defendant, succeeded him in the administration of the estate of Jonathan Walton.

The state of the assets at the death of William B. Walton, as developed in the schedule annexed to the plaintiff's complaint, is properly classified in the defendant's points, under three several heads.

1. Moneys received by William B. Walton as executor of Jonathan Walton, deceased, in payment of bonds, notes, and other demands belonging to the said Jonathan Walton at the time of his death.

As to these I have already expressed the opinion that they were only partially administered; that they were still, in the eye of the law, considered, in connection with the admitted allegations in the complaint, unadministered assets; and that in the latter character they necessarily passed, or rightfully would pass, into the legal custody and control of the plaintiff.

2. Two bonds and a note, executed by the said William B. Walton to the said Jonathan Walton in his lifetime, or the amount thereof. It does not expressly appear whether these had or had not been converted into money. If they had not, the plaintiff was clearly entitled to the securities themselves as a portion of the unadministered assets of Jonathan Walton. If they had been converted into money, then they are placed in the same category with the other partially administered assets above referred to of the same estate.

3. Real estate bid in by William B. Walton, as executor of Jonathan Walton, deceased, on a foreclosure by William B. Walton as such executor of a mortgage executed on said real estate to Jonathan Walton. Said real estate, subsequent to such bid, being occupied by William B. Walton at the

time of his death, and by the defendant, as his executrix, subsequently and being still occupied by the latter. This purchase was necessarily in judgment of law, as it appears to have been, according to the instruction of the purchasee, a purchase for the benefit of the estate of Jonathan Walton. Such estate, or its legal representative, would have a right to elect to take the benefit of such purchase or to hold the purchaser responsible for the value of the property or the amount of the investment. Such election has not been made. And the plaintiff, through the instrumentality of the court, has a right to hold the estate of William B. Walton accountable in some one or other of these modes for this property, and to require an account thereof. He may require an account of the moneys due on the mortgage, a delivery of the mortgage securities, an account of the rents and profits, and of the value of the estate.

Whether, therefore, we regard the assets in their unadministered form as charged in the body of the complaint, or in their partially administered condition as set forth in the schedule appended to the complaint, there seems to be abundant aliment for such account as is demanded by the complaint in this action.

2. It is objected that there is no allegation in the complaint that these assets ever came into the possession of the defendant. It is not necessary there should be. It is sufficient that they were in the hands of William B. Walton unadministered at the time of his death. That makes his estate liable to account for the same. The defendant is the representative of that estate, and as such the proper party to answer such a charge.

But I think the legal presumption without an express allegation is, that the property in possession of William B. Walton at the time of his death, passed into the hands of his executrix, and that, if in fact, it be otherwise, it lies with her to rebut that legal presumption by an express allegation to that effect in the answer to the complaint.

Further than this it expressly appears by the schedule annexed to the complaint that she is in possession as his

executrix of the real estate bid in on the mortgage foreclosure, and there is, therefore, a portion of the property for which she is liable to account.

3. It is further objected that the plaintiff's remedy, if available against the defendant at all, is so, only against her personally, and not as executrix of the will of William B. Walton, deceased. This is not an effectual answer to the whole complaint, for two reasons, 1. Because as to such property as was in the hands of William B. Walton unadministered at the time of his death, his estate, and consequently the defendant as executrix is liable for it. If, therefore, the defendant did not come into possession of the property, the estate, and consequently herself as its representative, is responsible for it, as being in the possession of William B. Walton at the time of his death. If it did pass into her possession as executrix, there is an increased propriety that as such executrix she should be accountable for it.

This is sufficient to show that as to some portion of these assets she is properly prosecuted as executrix. Whether as to other portions of them, for example, goods and chattels, bonds and securities, which are in her hands, in specie in the same condition in which they were at the death of Jonathan Walton (if there be any such), she may not be liable for them individually, it is not necessary to determine. I think, however, she would be also liable for them in her representative capacity — for she received them as such — she holds them as such — she claims them as such. As to the real estate, the charge in the complaint is that she is in possession of it as executrix of William B. Walton, deceased, and so far it seems to be manifestly proper to hold her to account in her representative character.

I therefore regard the action as properly instituted, and the complaint as showing a good cause of action. I think the judments of the Special and General Term of the Supreme Court should both be reversed with costs, and judgment should be given for the plaintiff on the demurrer with leave to the defendant to withdraw the same, and answer on payment of costs.

All for reversal except SELDEN, J., who reads for affirmance. DENIO, Ch. J., is for reversal on the ground that defendant, as executor of his father, is indebted to plaintiff for bonds and mortgages collected. Doubts whether he would concur as to property remaining in specie, or for real estate bid off by him.

JOEL TIFFANY, *State Reporter.*

GERHART VALTON v. THE NATIONAL LOAN FUND ASSURANCE SOCIETY.

The object of a physical examination of a person proposing to insure his life, by a competent physician, is to ascertain if he be laboring under, or is subject to, any disease or defect which may tend to shorten life.

It is proper for the examining physician to ask for information upon subjects which he may think affects the prolongation of the life of the applicant.

He may inquire into the pecuniary circumstances of the individual with that view, and on an examination upon that subject before a court, he may be asked what effect such information produced upon his mind and action in respect to such application.

MULLIN, J. The object of a physical examination of a person proposing to insure his life in an insurance company, by a competent physician, is to ascertain whether he is laboring under, or is subject to, any diseases or defect which may have a tendency to shorten life. The inquiry involves an examination not only into the present state of the various organs and functions of the body, but into the tendency of those organs and functions to take on diseases as affected by habits of mind as well as of body, temperament, tendency to disease from hereditary causes, and the occupation and condition in life of the subject. Of two persons of the same age and present bodily health, the one may present a risk entirely safe and proper to be taken—the other unsafe and improper to be taken. It is impossible to affix limits to the subjects, into which it is not only proper but necessary for an examining surgeon to inquire, in order to arrive at a conclusion upon which he can safely advise the acceptance or rejection of a risk.

Whether I am right or wrong in these views, I entertain no doubt that in many cases a knowledge of the pecuniary circumstances of a person desiring to be insured is material to the risk as affecting, in some degree, the life; and they are a legitimate subject of inquiry for the examining physician or surgeon.

This inquiry may not be material in every case, but the surgeon alone can tell whether it was, or was not, so in a given case. It is therefore competent to ask him whether he made the inquiry, and what response was given, and how far he deemed such answer material in deciding to advise the taking of the risk.

In such cases the very point of inquiry is, whether the pecuniary circumstances were deemed by him material, and whether he would have advised the acceptance of the risk if it had not appeared that the person desiring to be insured was a man of means. This is the only inquiry by which the real importance of the inquiry and answers can be ascertained.

For these reasons I think the learned justice who tried this cause erred in rejecting the question put to Dr. Staats, as to the effect upon his mind and action in respect to said application; and the judgment should for this reason be reversed, and a new trial ordered, costs to abide the event.

WRIGHT, J., expressed no opinion; all the other judges concurred.

E. PESHINE SMITH, *State Reporter.*

LORENZO D. DICKENS, Administrator of Sally Dickens, Respondent, v. THE NEW YORK CENTRAL RAILROAD COMPANY, Appellants.

Where the evidence on both sides is very close, and questions of recovery or defeat before the jury, nicely balanced—there being no manifest error in conducting the trial—it does not present a proper case for a court of review to interfere.

The question of negligence may be answered by reference to a great variety of incidents and circumstances proper for the jury to consider—and in respect to which they may exercise a judicious discretion.

THE appeal in this case is by the defendants from a judgment in favor of the plaintiffs, rendered in the sixth district.

The action was brought by the plaintiff as administrator of Sally Dickens, his wife, under the statute, to recover damages resulting to her next of kin in consequence of her death, which it is alleged was caused by the negligence of the defendants.

The cause has been twice tried. The verdict rendered on the first trial was set aside by this court. (23 N. Y., 158.)

The second trial was had before Mr. Justice BALCOM and a jury at the Madison Circuit in December, 1852, and on the trial the following facts were disclosed:

On the 29th of August, 1854, Sally Dickens, who was the wife of the plaintiff, and resided in the county of Herkimer, took passage in one of the defendant's cars at Little Falls for Canastota. She was accompanied by her mother, Mrs. Keller, and neither of them had ever before that time taken or left the cars at Canastota. They were on the mail train, which consisted of three passenger cars. Mrs. Dickens and her mother were seated in the middle car, on the south side and about the middle of the car.

At Canastota there are two railroad tracks, about seven feet apart. Passengers are received and discharged on the north side of the road where a hotel and the office of the railroad company are located, but there is nothing to prevent passengers from landing on either side of the tracks. The

mail train on this day was a little behind time, and arrived at Canastota on the most northerly track. As it was nearing Canastota an express train was also in sight coming from the west. The mail train on arriving at Canastota made a shorter stop than usual; the object of the managers of the train being to get away before the express train should arrive. It was a question, whether upon the arrival of the mail train at Canastota, the name of the station was announced in the middle car, and upon this the witnesses differed. But if the station was announced it was probably not heard by Mrs. Dickens and her mother. One of them inquired of a passenger who had entered the car whether the place was Canastota, and upon being informed that it was, left their seats and hastened to the west door of the car. She passed off on the south side of the car and was struck by the engine of the express train and instantly killed. The express train was then running at its usual speed of about 30 miles an hour.

The brakesman whose station was between the first and second passenger cars says, he knew the express train was coming, and *kept his station on the south side of the platform*, to prevent people from passing off on that side. Mrs. Dickens and her mother got off at that platform *on the south side*, and yet the brakeman says he first saw them on the *south track*. *He was looking to see the "Express."* The brakeman whose station was between the second and third cars also says "that he stood on the south side of the platform to keep the people from getting off on that side."

The conductor was in an unusual hurry. Before reaching Canastota he had only just stopped at other stations. At Canastota "the cars were stopped motionless not over a minute." One witness says "from thirty seconds to a minute." The defendant's flagman says: "I was so *flustrated* and confused I can't tell whether they stopped one or two minutes." Another witness says, "should not think they stopped a minute, if they did that." The conductor of the train says he stopped "from one and a half to two minutes" *and had not time to make provision for the safety of persons on the south side of his train.* He was engaged in

conversation with a music teacher who wanted some music purchased at Syracuse. He also says "if persons had been stationed at each platform for that object, they might have prevented persons getting off" and "that the stop at Canastota was a little shorter than the usual stop." And another witness for the defendants says, "the time of stopping there was a little shorter than usual."

At the time Mrs. Dickens and her mother got off, the train was in motion. One witness says, "the train had started with a slow motion." The fireman on the train says, "after we had gone the length of a car and a half or two cars, we heard the signal to stop." And this witness thought the train had gone the length of two cars before the women jumped off. The result proved that that motion was not sufficient to prevent their leaving with safety, and that they were not injured by leaving the car, but were killed by the express train, before they could get out of the way of it.

Mrs. Dickens had no children. Her father was dead and and her mother killed at the same time she was. She had two brothers living, both of them were men grown, and one sister who was aged thirty, and married and had children; another brother had previously died leaving two infant children. Mrs. Dickens was an active woman and in good health.

At the close of the plaintiff's case the defendants' counsel moved to dismiss the complaint on numerous grounds and this motion was denied and the defendants duly excepted.

At the close of the whole case, the counsel for the defendants asked the court to instruct the jury that upon the evidence the plaintiff was only entitled to recover nominal damages. This was refused and the defendants excepted.

The jury were instructed that to entitle the plaintiff to recover it must appear that the deceased was not guilty of any negligence which contributed to the injury.

That her only next of kin were her two brothers, one sister and two nephews or neices, and if the plaintiff recover, the amount recovered will be for the exclusive benefit of the next of kin. To this the defendants also excepted.

That the only damages the jury could give were such as the jury should deem a fair and just compensation, with reference to the pecuniary injuries resulting from the death of Mrs. Dickens to her next of kin, and whether more than nominal damages had resulted was a question for the jury. To this the defendants excepted.

The judge also charged that whether the next of kin would ever have been benefited pecuniarily by her living, was not certain, but speculative or matter of conjecture.

The counsel for defendants then requested the court to charge upon sundry propositions submitted, mainly the reverse of those which had been charged, and exceptions duly taken.

The jury found a verdict for the plaintiff for $500, and the General Term in the sixth district having refused a new trial judgment was entered on the verdict. From that judgment the defendants appealed to this court.

John H. Reynolds, for the plaintiff (respondent).

Daniel Pratt, for the defendants (appellants).

HOGEBOOM, J. This is one of those nicely balanced cases with which I think it is not proper for a court of review to interfere. Although the case appears to be a close one, both on the question of the negligence in the agents of the defendants, and the deceased whom the plaintiff represents, and the evidence is not very decided or controlling either way, yet I think there was enough to submit to the jury, and no legal error in leaving the question to them. As to the negligence of the defendants there were these facts for their consideration: the train was behind time; the stop at the station unusually short; the conductor and his subordinates in a hurry; some of them excited; some doubt whether notice of the station was given; an undue anxiety to leave before the express train arrived; a failure to adopt very decided precautions in keeping passengers from alighting on the south side of the track; some inattention to his duties on the part of the brakeman stationed between the cars to warn passen-

gers not to get out on that side; the conductor himself not occupied in the very vigorous discharge of his duties, but more pleasantly employed; and in general a lack of that close and careful attention which in circumstances rather perilous and critical like those which transpired on this occasion, is, to, say the least a matter of wise precaution, if not of the most imperative duty.

As to the negligence of the deceased, the degree of care and prudence devolving upon her is somewhat to be measured by the observance of proper precautions on the part of the defendants. If notice of the arrival at the station and the name of the station were not given, she was in a measure excusable for not knowing it, and of course for not acting seasonably upon such knowledge. If, as is known, the village which was the place of her destination was on the south side of the track, and she was so far a stranger as not to be likely to know that the passenger depot was on the north side, she does not seem to have been blameworthy in attempting to leave the cars on the south side. If her situation in the cars made it unlikely for her to know that an express train was approaching, and no person in fact notified her of the approach of such a train, it would not seem to have been an incautious act to get upon the south track. If she only learned the name of the station by inquiry from a fellow passenger without notification from the defendants, and the train did not stop long enough for a person receiving this tardy information to get off from the train before it was slightly in motion, after a stop unusually brief, it would not seem to have been necessarily such negligence as should defeat the action, for her to leave the train under such circumstances If the express and mail trains were not accustomed to meet at this point it was not negligence in her not to anticipate the arrival of the express train, and, of course, not to guard against it unless she was otherwise sufficiently and seasonably advised of its approach. The imputation of negligence in all these particulars depends very much upon the observance of all proper precautions on the part of the defendants, and if the

jury were warranted in finding against them upon the primary question of negligence on their part, as perhaps they did in all these particulars, I do not think we are in a situation to say that there was legal error in submitting the question of the plaintiff's, as well as the defendants', negligence to the jury. This question of negligence depends ordinarily upon so many minute circumstances, and is governed so much by the facts of each particular case, that it is very dfficult to lay down any safe or practical general rule on the question what constitutes it, and it is well said that the evidence of it, should be clear and decisive, to impute legal error to a judge who submits it under conflicting facts to the determination of a jury.

In regard to the rule of damages, I think the charge of the judge was in conformity to the statute and sufficiently guarded and limited in reference to the facts of the case. He appears to have been strictly within the limit of the rule recently laid down in this court, after much consideration and two successful arguments, in the case of *Tilly* v. *the Hudson River Railroad Company*. I think the defendants cannot successfully assail the charge on this point unless it is a case for limiting the plaintiff to nominal damages. We are not at liberty to lay down any such restricted rule, without violating the statute and the current of former decisions. We have frequently had occasion to say that the statute was not very precise in its terms, nor susceptible of a very clear and exact construction, but we regard it as obvious that from its scope and tenor, some latitude must be allowed to the careful discretion of a jury, in assessing the damages of each particular case. It may be, and is, probably, true, that this power is sometimes abused, but the correction is not with this court. It is not always easy to see how the death of a particular individual, and she a wife, will operate to the pecuniary prejudice of collateral relatives, and if so, to what extent. But as the law does not require direct and precise proof on this subject, and has committed to the jury a liberal discretion in its actual disposition, we cannot say, in view of the not very extravagant sum assessed by the jury in this particular case,

if any sum whatever were to be allowed, that any principle of law has been violated.

The judgment of the court below must be affirmed.

All affirm except DAVIES, J., who is for reversal. SELDEN, J., does not vote.

JOEL TIFFANY, *State Reporter.*

DAVID KELLY, Administrator, etc., of Catharine Kelly, deceased, Respondent, *v.* ANTHONY J. CAMPBELL, Appellant.

A gift by a husband to a wife will be upheld without the aid of the statutes of 1848, 1849, 1860 or 1862, where the rights of creditors are not concerned.

The husband may act as the agent of the wife and what he said while acting as her agent at the time of taking a bill of sale, etc., is a part of the *res gesta*, and therefore competent evidence for the wife.

BALCOM, J. The bill of sale of the goods, from Jones to Mrs. Kelly, was dated and executed on the 5th day of February, 1861. Her coverture did not then prevent her from purchasing the goods and going into trade as a shoe merchant (Laws of 1860, p. 157, §§ 1, 2.)

The action for the conversion of the goods by the defendant was properly bought in her name. (Laws of 1860, p. 158, § 7; Laws of 1862, p. 344, § 7; Code §§ 111, 114.)

The bill of sale itself authorized Mrs. Kelly to maintain the action in her own name, unless it was impeached for fraud. (27 Barb., 178; 32 id., 293; 4 Kern., 555.)

The notes surrendered, as the consideration for the bill of sale, were payable to Mrs. Kelly or order, and the presumption was that they were given for a consideration moving from her, and were her separate property. But it was competent for her to prove by her daughter, Catharine D. Jones, that her husband gave her money from time to time and told her to do with it as she pleased; and that she kept the money, so received, herself, and deposited it in a bank. This evidence tended to establish that the money, she loaned to Jones for the notes, was her own and not her husband's.

A gift by a husband to a wife will be upheld, when the rights of creditors are not in question, without the aid of the statutes of 1848 or 1849, 1860 or 1862. (17 Johns., 548; 3 Edwards' Ch., 92; 2 Kent's Com., 9th ed., 155; 4 Comst., 284; 7 Johns. Ch., 57; 3 Paige, 440; 4 Barb., 546; 8 Paige, 161; 3 Bradf., 7; 24 N. Y., 623; 2 Bosw., 92; 2 Md. Ch. Decis., 353; 5 Penn., 154; 29 id., 43; 3 Cush., 191; 6 id. 20.)

The husband of Mrs. Kelly acted as her agent in taking the bill of sale, and would be estopped from claiming the goods as his own.

The court, therefore, properly charged the jury, that the bill of sale conveyed to Mrs. Kelly the title to the goods, as between Jones and her husband, and authorized her to maintain the action for her separate property.

The foregoing views also show that the court rightfully refused to charge the jury as requested by the defendant's counsel.

The whole charge is not set out in the case and we must presume that the question of fraud was properly submitted to the jury.

Whether the verdict was against evidence is not within the province of this court to determine. The decision of the Supreme Court that it was not against evidence is conclusive upon the defendant.

What Mr. Kelly said when he gave his wife money, and also what he said as to the person for whom he was acting when he took the bill of sale, *i. e.*, that he was acting as agent for his wife, was *res gestæ*, and therefore competent evidence for his wife. (23 N. Y., 502; 1 Greenl. Ev., § 108; Cow. & Hill's Notes, 592 to 606; 1 Denio, 141; 9 Barb., 271; 29 id., 290.)

For these reasons I am of the opinion the judgment of the Supreme Court should be affirmed with costs.

DAVIES, J., also delivered an opinion for affirmance and all the judges concurred.

Judgment affirmed.

JOANNA MULFORD and others, Respondents, v. JAMES MULLER and others, executors, etc., of John Cassidy, deceased, Appellants.

Parol evidence is competent to show that an assignment, absolute in terms, is intended as collateral security merely.

THIS was an action, that was brought in the Supreme Court against John Cassidy, since deceased, to foreclose a mortgage on certain real estate situated in the county of Suffolk; which mortgage was dated the 10th day of November, 1857, and executed by Cassidy to secure the payment to the plaintiffs of the sum of $9,450, with interest at six per cent, in the manner and at the times specified in the condition of a bond given by Cassidy, that accompanied the mortgage.

The condition of the bond contained the following clause: "It being understood that said Cassidy shall assign and transfer to said obligees (who were the plaintiffs), $5,500 of the principal of a certain judgment obtained in the Supreme Court against the late city of Williamsburgh, together with the interest that may accrue thereon at six per cent per annum, and which judgment and interest, when paid by the city of Brooklyn, shall be received by the said obligees in full for the sum aforesaid, the said Cassidy hereby guaranteeing that the said judgment shall be collected and paid, on or before the date aforesaid, viz.: the tenth day of September, 1860."

The bond bore even date with the mortgage. On the same day the bond and mortgage were given, Cassidy executed an assignment, bearing date on that day, to the obligees in the bond, who were the plaintiffs, which recited that he recovered a judgment against the city of Williamsburgh on the 5th day of August, 1857, in the Supreme Court, for $6,364.29; and it assigned $5,500 of the judgment to the plaintiffs, with interest thereon at six per cent; and then stated, as follows: "which sum, when collected, shall be applied by the obligees,

upon the aforesaid bond of Cassidy;" and in and by the assignment Cassidy covenanted that he would not collect or receive the $5,500, and interest, or any part thereof, nor release nor discharge the said judgment, but would "own and allow" all lawful proceedings therein; "the said parties of the second part saving the said parties of the first part harmless of and from any costs in the premises."

The defense was, that the $5,500, of said judgment and interest, had been paid and received in such a manner that the same should be allowed and credited to Cassidy on the bond and mortgage. If that sum and interest had been so applied on the bond and mortgage the same would have been satisfied.

The action was tried before a referee.

It appeared that after the recovery of the judgment, and prior to the 10th day of November, 1857, the city of Williamsburgh had been made a part of the city of Brooklyn; and that an action upon the judgment against the latter city was then pending, which had been brought by one Stevenson, as attorney, upon the retainer of Cassidy. The city of Brooklyn had notice of the assignment to the plaintiffs on the 16th day of November, 1857.

Stevenson recovered upon the judgment, against the city of Williamsburgh, another judgment against the city of Brooklyn; and he received the money due on the last mentioned judgment from the comptroller of the latter city, on the 18th day of June, 1859, "in the character of attorney of Cassidy." Stevenson testified that he had no authority from the plaintiffs to receive the money; and that he acted under the directions of Cassidy in collecting the judgment. He gave a satisfaction piece of the judgment as attorney for Cassidy. He paid $932.22 of the money to one Maurice, on the orders of Cassidy. Cassidy directed Stevenson not to pay any of the money to the plaintiffs, and demanded it of Stevenson, and threatened to sue him if he did not pay it to him.

Stevenson paid $3,000 of the money to the plaintiffs' agent, which was applied on the bond and mortgage. He

refused to pay any more of the money to the plaintiffs, on the ground that he had a prior claim to the same for services rendered for Cassidy, as his attorney and counsel on claims against the cities of Brooklyn and Williamsburgh under a special agreement. But the terms of such agreement were not proved.

Cassidy objected and excepted to the admission of the following evidence: 1. Parol evidence that $5,500 of the judgment was assigned *as collateral security* for the payment of a like portion of the money mentioned in the condition of the bond. 2. Evidence that Cassidy said, before the assignment was executed, that he did not expect the plaintiffs to relinquish any claim any faster than the money was paid. 3. That the plaintiff's agent told him the plaintiff would not accept any assignment of the judgment as payment but as collateral. 4. The evidence of what Cassidy said to Stevenson, hereinbefore mentioned. 5. That Cassidy directed Stevenson to pay $932.22 of the money to Maurice. 6. The evidence that in collecting the judgment Stevenson acted under the directions of Cassidy. This evidence was not contradicted.

Cassidy's counsel asked the referee to dismiss the complaint on the ground that there was no breach shown in the condition of the bond and mortgage; which motion the referee denied, and Cassidy's counsel excepted.

The referee found there was due on the bond and mortgage the sum of $3,505.39. He refused to allow thereon any more than $3,000 of the money collected upon the judgment against the city of Brooklyn. He found that, although the assignment of $5,500 of the judgment against the city of Williamsburgh was absolute, it was intended by the parties only as collateral security for the payment of a like portion of the money secured by the mortgage. He also found the other facts hereinbefore stated.

Cassidy's counsel excepted to the findings of the referee.

A judgment for the sale of the mortgaged premises was entered upon the decision of the referee in conformity therewith; which judgment was affirmed at a General Term of

the Supreme Court in the second district. After it was affirmed Cassidy died and his executors were substituted as defendants in the action, and they appealed from the judgment to this court.

The case was submitted upon printed briefs.

D. P. Barnard, for the appellants.

W. P. Buffett, for the respondents.

BALCOM, J. The appellants' counsel contends that the referee erred in allowing the plaintiffs to prove by Stevenson that he acted under the directions of Cassidy, in collecting the judgment of the city of Brooklyn; and that the referee also erred in permitting Stevenson to testify that Cassidy directed him not to pay the money he received upon that judgment from the comptroller of said city, to the plaintiffs, and threatened to sue him if he should pay such money to them. His position is, that if Stevenson was the attorney of Cassidy, any directions the latter gave the former, and all conversations between them, touching the collection of the judgment and the disposition of the money received thereon, were covered by the seal of professional confidence.

The decisions of the referee in admitting this evidence were so palpably correct, that I need only say the facts testified to by Stevenson were not of the character which an attorney is prohibited from disclosing as a witness without the consent of his client. (1 Greenl. Ev., § 245.)

It is not necessary to determine whether the referee erred in receiving parol evidence of what was said between Cassidy and the plaintiffs' agent, before the assignment of $5,500 of the judgment against the city of Williamsburgh was made to the plaintiffs, to show that the assignment was taken by the plaintiffs as collateral security for a like portion of the money mentioned in the bond and mortgage; for the assignment and bond, themselves, clearly establish that fact. Those instruments show that the plaintiffs were not to apply the $5,500, and interest thereon, upon the bond and mortgage until the same should be collected or received by them, or some agent or attorney for them by their authority.

The question is not whether the plaintiffs could have compelled the city of Brooklyn to pay the $5,500, and interest, again to them, after the comptroller had paid the same to Stevenson or whether they could have collected that money of Stevenson after he received it; but whether Cassidy, after Stevenson had collected the money, as his attorney and under his directions, of the city of Brooklyn, and by his directions had refused to pay $2,500 of the same, and the interest, over to the plaintiffs, could compel the plaintiffs to apply the portion not paid over to them, upon the bond and mortgage.

Cassidy covenanted in the assignment of the $5,500 and interest, that he would not collect or receive the same, or any part thereof, nor release nor discharge the judgment; yet Stevenson did all of these things and retained $2,500 of the money, besides interest, by his directions; and according to the bond as well as the assignment, the plaintiffs were not to apply any portion of the $5,500, and interest, upon the bond and mortgage until the same should be collected—which means collected by them or their agent or attorney—and not by Stevenson, whom they did not employ, and who never professed to act as their agent or attorney.

These facts clearly estopped Cassidy from claiming that Stevenson was the attorney of the plaintiffs in collecting or receiving any portion of the judgment; and also estopped him from insisting that Stevenson did not collect the whole judgment and retain $2,500 of it, besides interest, as his attorney.

The case therefore was correctly determined by the referee, and the judgment of the Supreme Court in conformity therewith should be affirmed with costs.

Judgment affirmed.

JAMES EARL, Appellant, v. DERRICK CLUTE, Jr., Respondent.

It is not competent to prove, for the purpose of establishing the fact, that a chattel mortgage was executed as security for a note given to compound a felony, that one of the assignors of the mortgage, said before the assignment thereof, that he knew the mortgage was given to settle and drop a criminal prosecution.

THIS is an appeal from a judgment affirming a judgment entered against the appellant, and in favor of the respondent, in an action brought by the plaintiff against the defendant to recover the possession of certain personal property, viz. one gray horse. The action came on for trial at the Saratoga circuit, on the 21st day of September, 1858, before Justice ROSEKRANS and a jury. The plaintiff proved that he owned the horse in question in September, 1856; and that he remained in his possession until about January 29th, 1857, when he was taken away by Thomas J. Clute, and delivered to the defendant. That on or about March 6th, 1858, the plaintiff caused the said horse to be demanded of the defendant; but the defendant refused to give him up. The property was taken from the defendant and delivered to the plaintiff on that day by virtue of proceedings in that action. The value of the property was admitted to be $90. The plaintiff then rested. The defendant's evidence went to prove that he was the owner of said property, and had acquired the same by purchase from Thomas J. Clute about February 20, 1857, and that Thomas J. Clute had acquired the right to the horse by virtue of a chattel mortgage executed on the part of the plaintiff to one Close, Degraff and Van Hyning, who had for value assigned the same to Clute.

In regard to this mortgage the plaintiff claimed that it was void as given by plaintiff and his son James Emmett Earl to compound a felony, to wit: a complaint for perjury made by one McCarty, a defendant in a suit tried before a justice, in which the son, J. E. Earl, had testified falsely against him. The mortgage was in fact given as a collateral security for a note which the mortgagees had signed for Earl

and his son, and as this note was given to McCarty and for the amount of the judgment which was obtained against McCarty, it was claimed that there was evidence to go to the jury that the object of the mortgage was to hush up the charge of perjury against the son. But there was no direct evidence that it was given for such purpose, and the mortgagees denied it, and the evidence was decisive in their favor.

The plaintiff offered to prove by William B. Harris, that Fellows, who held another mortgage on the property, stated to Van Hyning before the assignment of the mortgage to Clute, that he, Fellows, had a mortgage upon the horse in question, and asked Van Hyning if he did not know that the mortgage in question was given to settle and drop that criminal prosecution against Emmett. To which Van Hyning replied, he did. The evidence was objected to on the part of the defendant's counsel as not competent in this action, it being hearsay evidence. The objection was sustained by the court, and evidence excluded, to which the plaintiff's counsel excepted.

The plaintiff showed by Gideon Close, who was sworn on the part of the plaintiff, that prior to the execution of the mortgage in question, the plaintiff stated to said witness that the consideration for which the mortgage was to be given was not to be used or given to settle or drop the criminal prosecution, but to pay back a judgment obtained against McCarty, which he, plaintiff, assigned to Fellows. That Close communicated the statements made by plaintiff to him, to Degraff and Van Hyning, who, together with the witness, gave their note and money for the mortgage in question. The plaintiff then rested.

The defendant moved for a nonsuit on the ground that the evidence was insufficient to warrant a verdict for the plaintiff. The plaintiff asked to submit the questions of fact to the jury, but the court refused, and granted the motion for a nonsuit, to which refusal and decision the plaintiff duly excepted. Judgment of nonsuit was thereupon entered, and, on appeal to the general term, affirmed. From the latter judgment the plaintiff appealed to this court.

John K. Porter, for the plaintiff (appellant).

T. J. Clute, for the defendant (respondent).

HOGEBOOM, J. The plaintiff offered to prove by William B. Harris, that one Fellows stated to Van Hyning (one of the mortgagees) before the assignment of the mortgage to Clute, that he had a mortgage upon the property in question, and asked Van Hyning if he did not know that the mortgage in question was given to settle and drop the criminal prosecution against James Emmett Earl; to which he replied he did. This evidence was objected to by defendant's counsel as not competent in this action, and the objection was sustained by the court, and the evidence excluded. To which the plaintiff's counsel duly excepted. This exception is not well taken. In the first place, it was not material to this issue, whether Fellows had a mortgage upon the property in question, and as this evidence was properly excluded, the whole exception, being general, must fail. Again, as to the residue of the evidence, the offer was to show an *admission* by one of the mortgagees; that before he had made the assignment to Clute, not before he took the mortgage, he knew it was given to settle a criminal prosecution. Knowledge acquired at so late a period could not invalidate the mortgage. Besides, Van Hyning himself was a competent witness, and his admissions improper testimony. The true question was, whether the mortgage was *in fact* given for an illegal consideration; not whether he had said so. (*Paige* v. *Cagwin*, 7 Hill, 361.)

The motion for a nonsuit was also properly disposed of. There was no sufficient evidence that there was any agreement to compound a felony; still less, that the mortgage was the result of such an agreement to compound a felony; still less, that the mortgagees had knowledge that the note which the mortgage was given to secure, was tainted by such an illegal purpose. All which were essential to make the mortgage invalid, even as against them.

The evidence was insufficient to warrant a verdict for the plaintiff, or to be submitted to the jury for that purpose.

The judgment of the Supreme Court should be affirmed.

JAMES FREELAND, Respondent, v. GEORGE VAN CAMPEN, Appellant.

Parties to protested negotiable paper may, by special agreement, provide for taking up such paper, without altering the status of their legal rights in respect to each other.

HOGEBOOM, J. The rights of the parties depend upon the true construction to be given to transactions between them at their different dates.

On the 27th of February, 1854, the plaintiff purchased of the defendant lumber, the supposed quantity of which entitled the latter to compensation to the amount of $2,660, and for this amount the plaintiff gave to the defendant his negotiable note, indorsed by one Blackmore, payable at the Leather Manufacturers' Bank in New York, on the 31st day of May, 1854. This note was shortly thereafter negotiated by the defendant at the Steuben County Bank, and both parties became liable upon it. Before its maturity, and on the 29th day of May, 1854, the plaintiff and defendant accounted together in regard to the lumber, and by measurement ascertained a deficiency in the quantity which entitled the plaintiff to a deduction of $677.95 from the purchase price; so that the true amount for which he was liable to the defendant on account of the lumber was $1,982.05, instead of $2,660. Some provision therefore was to be made for this; especially as the $2,660 note would mature in a few days. The plaintiff was then in possession of a good and collectible draft drawn by Almy & Wilcox, of Cincinnati, on Duncan, Sherman & Co., of New York, payable without grace on the 1st day of June then next. This was less than his just indebtedness to the defendant by the sum of $384.90. The plaintiff thereupon executed and delivered to the defendant his note for the last named sum, payable on the 1st day of August thereafter, at the Leather Manufacturers' Bank in New York, and also indorsed and delivered to him the draft before mentioned *in full payment* of the note of $2,660. This agreement was reduced to writing at the time. The legal

effect of it was, I think, as between the present parties, to make the defendant and not the plaintiff liable to pay the $2,660 note at the Steuben County Bank. The plaintiff had put into the defendant's hands available paper to pay so much of that note as he was equitably bound to pay. He had in effect negotiated or sold to the defendant such available paper in full payment and extinguishment of such liability. The defendant could doubtless have realized the full amount by negotiating it at the Steuben County Bank. If he had done so and had procured the discount of his own paper for the balance, the $2,660 note would have been paid, and both parties would then have remained liable, as between themselves, for precisely what was equitable between them. This was doubtless what was intended. At all events, for a perfectly valid price and consideration, to wit: the plaintiff's note payable at a future day, and the Cincinnati draft, also not yet matured, the plaintiff paid so much of the $2,660 note as he was, as between the parties, bound to pay, and these were received *in payment*. Such is the language of the written contract, and there is nothing in the case to alter or qualify its effect. The legal effect of the transaction was not, as the defendant's counsel supposes, to make the defendant the mere bailee or agent of the plaintiff to negotiate and collect the draft and small note and apply the proceeds to the extinguishment of the $2,660 note. Even if such was the transaction, the defendant neglected his duty in not promptly transmitting the draft for collection, and if the plaintiff in any way subsequently paid of this amount of $2,660 more than by this agreement it was intended he should pay, it is not perceived why he ought not to be permitted to recover it as money paid for and on account of the defendant. By reason of the defendant's negligence in forwarding the draft for collection it was not seasonably protested, and the plaintiff was discharged from his liability as indorser.

On the 10th of August, 1854, the parties made a further agreement in writing, reciting the foregoing facts, and that the $2,660 note and the $1,597.15 draft were still unpaid, and stipulating that for the present the plaintiff should take care

of so much of said note of $2,660 as equaled the amount of the draft, and that the defendant should take care of the balance; but without in any respect altering existing, or creating new or different liabilities of the parties to each other or to other persons.

After this explicit statement and reservation of their rights, I do not see how, by this arrangement, the position of the parties was in any respect changed. The plaintiff must by this time have paid his $380.90 note, for it had just previously matured, and nothing further is said about it. He was also legally discharged from his liability on the draft because it had not been duly protested. On the same day he performed his part of the agreement of that date by paying $1,620.83 on the $2,660 note, the defendant paying the balance. It being necessary to take measures to collect the draft, the defendant placed it in the plaintiff's hands for that purpose. It was prosecuted against Duncan, Sherman & Co., by the advice of the defendant, and in his name, the defendant giving the plaintiff written authority for that purpose, and authority to receive and control the proceeds when collected. The suit brought against Duncan, Sherman & Co. was ultimately, and on the 26th of February, 1857, compromised, with the advice and consent of the defendant, upon payment of the principal of the draft, without interest or costs. The plaintiff's costs, $60, and $8 for exchange, being deducted by the attorneys from the same. The balance, $1,529.15, was put into the plaintiff's hands on the 26th day of February, 1857. The difference between this sum and the amount paid by him in August 1854, with interest thereon, was the amount which the plaintiff recovered on the trial, with the exception of one or two small items of claim and set-off which were not disputed.

The plaintiff was entitled to recover this amount. The rights of the parties were fixed by the agreement of May 29th, 1854, and not altered by the agreement of August 10th following. The arrangement for taking up the $2,660 note was a temporary one, and the amount then paid by the plaintiff wholly in excess of what was due from him. The

debt was the debt of the defendant, and the plaintiff in effect his surety on the note. The draft was subsequently prosecuted for the benefit of the defendant, and the expenses of collection lawfully deducted from the amount with which the plaintiff was otherwise chargeable. By giving effect to this arrangement, the intentions of the parties will be carried out, justice done, and the legal rights of the parties preserved.

I think the judgment should be affirmed.

SAMUEL G. OGDEN, JR., *v.* WILLIAM M. RAYMOND and WILLIAM H. FORBES.

The provisions of the Revised Statutes (1 R. S. 591, § 8), prohibiting the conveyance, etc., of real property, or other effects of a corporation, etc, exceeding one thousand dollars in value, without being authorized by a previous resolution of its board of directors, has no application to a case of transfer to a *bona fide* holder for a valuable consideration.

Appeal from Judgment of Superior Court of New York.

G. W. Stevens, for the plaintiff.

P. Y. Cutler, for the defendant.

WRIGHT, J. The case of *Ogden* v. *Andre and others*, decided by this court at the last March Term in its principal features and in the questions raised by the appellants, was like the present one. Both actions were upon subscription or advance premium notes held by the International Insurance company, and transferred by such company to Samuel G. Ogden, senior, as security for a loan of $19,000, made by the latter to the company to meet its liabilities. There was no evidence in either case tending to show that the senior Ogden was not a *bona fide* holder of the notes, nor that they had not been negotiated by the insurance company in the course of business; and in the present case these facts were not put in issue by the pleading. In both cases the transfer of the notes was made by the president of the company without any previous resolution of the board of trustees;

but in this case the question of the authority of the officer to act without such resolution is not involved. The complaint averred that the note was duly indorsed, transferred and delivered to the plaintiff by the International Insurance company, and that fact was not denied by the answer of the defendants.

In the case of *Ogden* v. *Andre* it was held that the insurance company had authority to transfer the notes to Ogden; and that such transfer was not invalid as being in contravention of the provisions of section 8 of article 1, title 2, chapter 18, part I. of the Revised Statutes. (1 R. S., 591, § 8.) The insurance company was authorized by its act of incorporation to pledge or negotiate the notes for money borrowed (Laws of 1844, chap. 115, § 11; Laws of 1855, chap. 295); and the provision of the Revised Statutes has no application to the case of a transfer to a *bona fide* holder for a valuable consideration. The provision of the Revised Statutes is that "No conveyance, assignment or transfer not authorized by a previous resolution of its board of directors shall be made by any such corporation of any of its real estate, or of any of its effects, exeeeding the value of one thousand dollars;" but this section shall "not be construed to render void any conveyance, assignment or transfer in the hands of a purchaser for a valuable consideration and without notice." (1 R. S., 591, § 8.) If the section has any application to the transfer of a promissory or subscription note bought by an insurance company in the course of business, to earn money to meet its liabilities, this case does not fall within it. Ogden, the transferrer, was a *bona fide* holder. Besides, in this case the property transferred did not exceed the value of one thousand dollars. It was the defendant's promissory note for $750 which had not matured at the time of the negotiation.

The judgment of the Superior Court should be affirmed.

All the judges were for affirmance.

Affirmed.

HENRY G. RICE *et al.*, *v.* RALPH HENRY ISHAM.

Questions of fact upon a trial before a judge without a jury, and before a referee, are open to examination only upon an appeal to the General Term of the court in which the trial took place.

If it cannot be made out from the findings whether the judgment is right or wrong, it will be assumed to be correct and the judgment will be affirmed.

Such judgment, to be reversed, must appear to be erroneous by applying the conclusions of law, or the general judgment pronounced, to the conclusions of fact stated in the findings.

When, through the inadvertance of counsel, the facts are so presented that it is impossible, without violating well-settled rules of practice, to do justice between the parties, this court has power to suspend the judgment in order to enable the party, whose rights might otherwise suffer, to apply to the court from whose judgment the appeal was taken, for a re-settlement of the case.

DENIO, Ch. J. This action was in the nature of assumpsit for money paid to the defendant's use at his request, and was brought in the Common Pleas of the city and county of New York, to recover an alleged balance of $3,772.09, claimed to be due to the plaintiffs, for advances as the factors of the defendant, who was a manufacturer of felt goods at Glenville, in Connecticut, the plaintiffs carrying on their business at the city of Baltimore. The facts, as found by the referee before whom the case was tried, were as follows: In February, 1852, an arrangement was entered into between the parties by mutual letters passing between them to the effect that the defendant should make consignments of his goods to the plaintiffs for sale on commission, and that the plaintiffs should accept the defendant's bills at six months for two-thirds of the market value of the goods. During the course of the dealings which ensued, the individuals of the firm of the factors was changed by the retirement of one of the partners and the taking in of a new partner, but after the close of the transactions the outgoing partner assigned his interest in the claim against the defendant to the plaintiffs, and no point is now made upon the question of parties. Business of the character contemplated was commenced and carried on down to and including June 17, 1854, one Whittal acting as the agent of

the defendant, he having been named by the defendant to the plaintiffs as the person who, on behalf of the defendant, would forward the goods and draw the drafts. Eight several consignments of goods were made to the plaintiffs, the last of which was forwarded on the 21st January, 1854. The defendant drew a large number of bills on the plaintiffs, the last of which was dated June 17, 1864. These were drawn by Whittal as agent, to the order of, and were indorsed by the defendant, and they were payable six months after date. They were accepted and paid at maturity by the plaintiffs, the drawees. The goods consigned were, after considerable delay, finally sold; and, after crediting the proceeds, there remained a balance due from the defendant to the plaintiffs on the 20th February, 1856, of the amount above mentioned.

The defense set up arose in part out of an alleged change in the proprietorship of the manufacturing business, by means of which, as the defendant insisted, the liability for the advances, or a portion of them, had devolved upon an association or corporation which had succeeded to the business of manufacturing the felt goods, and which had taken the place of the defendant in the dealings with the plaintiffs. On that subject the referee found that the manufacturing business was carried on in the name of the defendant until the month of December, 1853, when, for reasons of convenience and advantage to himself, the name of "The Glenville Woolen Company" was used by him, but without any change of interest; and that on the 25th May, 1854, a preliminary meeting for the organization of a company under the laws of Connecticut was held, and that on the next day a second meeting was held; but that the plaintiffs had no notice of such movements until on or about the 13th July, 1854; that said company was not completely organized, or authorized to commence business until the 13th day of December in that year; that the plaintiffs had never received any notice forbidding them to pay their acceptances, that they had not received any consideration for discharging the defendant from his liability, nor had ever agreed to discharge

him or to accept the corporation as their debtor instead of the defendant. The referee accordingly reported that in point of law the plaintiffs were entitled to recover the above mentioned balance with interest; and judgment was rendered accordingly, which was affirmed at a General Term.

Upon this statement of facts, it is difficult to see how any question of law can arise. *Prima facie*, it is an ordinary case between factor and principal, where the factor has advanced in excess of the proceeds of goods placed in his hands to be sold. It is very familiar law, that in such cases an action of assumpsit upon the implied contract, arises in favor of the factor, to recover the balance against the principal. Accordingly, the trial and the argument of the defendant's counsel bring forward a variety of facts found in the testimony, which, as it is alleged, show that the referee arrived at incorrect conclusions of fact upon the evidence. Twelve of the fourteen exceptions to the report, are based upon an alleged want of evidence, to sustain his conclusions. The thirteenth claims that certain facts should have been found, which are not found, and the last is a general exception to all their conclusions of law and fact. The statement of facts found contained in the case were made in pursuance of an express provision of the Code (§ 272); and it is furthermore explicitly provided, that although questions of law, arising upon trials, before a judge without a jury, and before a referee, may be reviewed upon every stage of the appeal, the questions of fact are open to examination only upon an appeal to the General Term of the court in which the trial took place. (§§ 268, 272.) Plain as this seems to be, upon the language of the statute, it has frequently been found necessary to re-assert it, and the decisions have been uniform and consistent. (*Davis* v. *Allen*, 3 Comst., 168; *Easterly* v. *Cole*, id., 502; *Borst* v. *Spelman*, 4 id., 284; *Western* v. *The Mut. Ins. Co.*, 2 Kern., 258; *Dunham* v. *Watkins*, id., 556; *Griscom* v. *The Mayor of New York*, id., 586; *Hunt* v. *Bloomer*, 3 id., 341; *Johnson* v. *Whitlock*, id., 344; *Magie* v. *Baker*, 4 id., 435; *Smith* v. *Grant*, 15 N. Y., 590; *Turner* v. *Haight*, 16 id., 465; *Otis* v. *Spencer*, id., 610; *Griffin* v. *Marquardt*, 17 id., 28; *Viele*

v. *The Troy and Boston R. R. Co.*, 20 id., 184; *Carman* v. *Pultz*, 21 id., 547; *Grant* v. *Morse*, 22 id., 323.) Some of these cases, and especially the one last noted, show that it is the duty of the party who designs to appeal to this court to procure such a finding of the facts, as to show affirmatively the error upon which he relies. If it cannot be made out from the findings, whether the judgment is right or wrong, it will be assumed to be correct, and will accordingly be affirmed; in other words, the judgment must appear to be erroneous by applying the conclusions of law, or the general judgment pronounced, to the conclusion of facts stated in the findings, or the appellant cannot ask for a reversal. But as has been said, the facts found in the present case fully sustain the judgment given, and it must therefore be affirmed.

It sometimes happens that by an inadvertance of counsel the facts are presented in such a manner that it is impossible, without violating well-settled rules of practice, to do justice between the parties. In such cases it is in our power to suspend the judgment here, in order to enable the party whose rights might otherwise suffer, to apply to the court from whose judgment the appeal was taken for a re-settlement of the case. It having been very earnestly insisted in this case that if the facts could be examined, without prejudice from the findings of the referee, it would appear that the judgment was manifestly wrong, I have looked into the testimony with a view to the exercise of the jurisdiction referred to if it should be invoked.

It is contended that the defendant ought not to be charged with two of the drafts which were drawn upon, and accepted and paid by the plaintiffs, because, as it is said, they were drawn after the defendant had disposed of his interest in the manufacturing business. They were dated respectively the 27th May, and 17th June, 1854, for $800 and $700, by Whittal as agent, and were in no manner distinguishable in form, or otherwise, from those which he had been accustomed to draw when the defendant was confessedly carrying on the business under the name of the Glenville Woollen Company. Conceding that the transfer of interest had taken place before

their date, the plaintiffs had no notice of any such fact or of any change in the proprietorship of the business until the 13th July, which was nearly a month after the drawing of the last. Whittal was the individual named by the defendant as the person who would draw the drafts on his behalf, and he had drawn all which preceded these two in question. Upon these facts there could be no question but that the acceptances were property chargeable to the defendant. If one employ an agent who deals with another on account of his principal, and he revoke the agency but do not give notice to the party with whom the agent had dealt, the principal is bound by the subsequent dealings had in good faith with the agent. (Paley on Agency, by Lloyd, 170, 188; Story on Agency, § 470; 2 Kent's Com., 615; *Vernon* v. *Manhattan Co.*, 22 Wend., 183.)

Another position of the defendant's counsel is that the plaintiffs' acceptances to a considerable amount, matured and were paid after the defendant had ceased to be interested in the business, and it had passed into the hands of a corporation. It is urged that there is no evidence that the acceptances had been negotiated to a *bona fide* holder. The course of business was for Mr. Whittal to send the drafts, which were payable at six months, to the plaintiffs for acceptance, who returned them accepted, either to Whittal or to some other agent of the drawer named by him. The evidence does not show who was the holder when this paper matured, though the circumstances render it extremely probable that the defendant or Whittal used them by procuring them to be discounted in the course of the business. Still the evidence is not positive to that point. When produced by the plaintiffs on the trial they all bore the blank indorsement of the defendant. To charge the plaintiffs with having paid them in their own money so as to deprive them of the right to charge the defendant with such payment, an unlawful diversion of them should have been proved, and that plaintiffs paid them with notice of such diversion. As the evidence stands, it presents only the case of the plaintiffs accepting negotiable bills at the defendant's request, under the arrangement to

accept by way of advance, placing such acceptances in his hands to do with them as he pleased, and paying the bills to the holder at maturity. There is, I think, no principle which can justly preclude the plaintiffs from charging the defendant with the money thus paid.

The defendant's counsel contends, lastly, that the plaintiffs have released the defendant by means of their dealings with the company to whom he had transferred the manufacturing business. The defendant gave in evidence an instrument dated June 28, 1854, by which certain parties describing themselves as the president, treasurer and agent of the Glenville woolen company, in consideration of a transfer to that company made by the defendant, of the property employed in the manufacturing business there, engaged to assume the defendant's liabilities incurred in that business and to indemnify him against such liabilities. The plaintiffs received notice of the change of the business on the 13th July thereafter, and a few days later they were informed that the company had assumed the defendant's liabilities.

In the latter part of the summer of 1854 the goods which the plaintiffs had received from the defendant to sell had fallen in price, and it had become difficult to sell them, and they became anxious for a reduction of their advances, the balance of which amounted to over $8,000, which exceeded the proportions of the then market value of the goods for which they had agreed to accept in advance, and the drafts they had accepted were about maturing. They consequently contracted for such reduction. The correspondence was with Whittal, who had become the managing agent of the new proprietors, who, as has been mentioned, had assumed the liabilities of the defendant. The defendant insists, in the first place, that the plaintiffs had so contracted as to accept the new company as their debtors in the place of the defendant and to discharge the latter. But there is no evidence of an intention on their part to make such change. They had been told that this company had undertaken to discharge the liabilities of the defendant. It was indifferent to them what party paid them, so that they were paid by some one and

they naturally called upon Whittal and the other persons who represented this company, for payment, as that company had been named to them as the parties who were to liquidate these liabilities. This was the more proper because the company had become the owners of the goods on their hands, and entitled to control them, subject to the factor's lien. There was nothing in the correspondence which ensued which operated as a release of the defendant, unless the making and transmission of the bills and notes to be now mentioned had the effect of extending the time of payment of the debt which the defendant owed them. By the letters which passed between Whittal and the plaintiffs from the 31st August to the 13th November, 1854, inclusive, an understanding seems to have been arrived at that the plaintiffs' account should be reduced by the payment of $3,000 in cash, and that they should receive the debts of the company on themselves for about $6,200, payable on time, which they should procure to be discounted at the then prevailing rate of interest in order to place themselves in funds, and in the mean time sales of the remaining goods were to be made as fast as practicable. Accordingly, on the 13th November, Whittal sent to the plaintiffs three drafts of the company, amounting together to $6,200, bearing different dates in October and November, each payable six months from date, "to be discounted," as his letter expressed it, "and the proceeds used in liquidation of advances made against goods held by you on our account." The plaintiffs immediately acknowledged the receipt of the drafts, saying that it "would all be very well if they had been accompanied with a check for $3,000," which they hoped he would still remit. They did not procure the drafts to be discounted or use them in any way, and the $3,000 was never remitted, Whittal, writing them on the 18th November, saying that he could not possibly send the cash at present on account of the extreme pressure of the money market. These drafts did not operate to extend the time of payment of the balance due from the defendant; for first, they were only to be received in connection with the cash payment which was to

have been made at the same time, and which was never made, and secondly, they never became operative instruments in the hands of the plaintiffs. They were the drawees, and could never have maintained an action on them against the drawers and indorsers. It is unnecessary to say what would have been their effect if the plaintiffs had procured them to be discounted by third parties; but this they did not do, apparently because Mr. Whittal had not fulfilled his part of the arrangement under which they were sent.

But sometime in April, 1855, Whittal sent to the plaintiffs two promissory notes of this company, dated respectively on the 1st and 27th of that month, for $1,000 each, and payable six months after date. The purpose of transmitting this paper is not fully explained, but it seems probable from the correspondence that it had some reference to the cash payment agreed to be made the preceding year. The receipt of these notes is relied upon as extending the payment of so much of the debt due from the defendant, the argument being that, under the circumstances, the defendant is to be considered as standing in the relation of a surety for the company, it being the principal debtor. I hardly believe these notes were sent on the 22d of March, 1855, the plaintiffs being apparently under some apprehension that the ground now relied upon might be taken, addressed themselves directly by letter to the defendant. They mentioned to him that the balance in their hands was about $8,000, and gave him a statement of the quantity of goods remaining unsold. They then referred to an interview, between Mr. Chase, one of the plaintiffs' firm, the defendant himself, and Whittal, a few weeks before, in which it was, as they say, agreed that their advances should be reduced by the Glenville company, giving their notes for that purpose, with a letter from the defendant approving of the same, and that they, the plaintiffs, had learned by a letter from Whittal that he desired a little more time to perfect that arrangement, and that they would be satisfied with an answer from him that it should be arranged in the first two weeks of the next month. The defendant answered that letter from New York the next day.

He makes no denial of the interview referred to by the plaintiffs, or of the arrangement said to have then been made, but says he will lay their letter before Whittal on his return from a journey upon which he was then absent; that he knows no reason why an arrangement he had agreed upon should not be carried out by him within the time suggested. This letter is somewhat cautious, and a little evasive; and looking at it in the light of subsequent events, there is some ground to suspect an intention to lead the plaintiffs on to a committal which would discharge the defendant from his liability. It imports, however, *prima facie*, the consent of the defendant, that the plaintiffs might receive the notes of the company without prejudice to his liabilities, and such is the sense in which the plaintiffs had, in my opinion, a right to receive it, and in which they certainly did regard it. That they did so regard it is entirely evident from their receiving the notes of the company shortly afterward. The notes were not paid, but were protested at maturity, and the company failed in December following. The defendant cannot, in my judgment, object that the plaintiffs had given time to the company to his prejudice, as the evidence shows that the notes were taken with his consent, and in pursuance of an arrangement to which he was a party. There are some minor circumstances relied upon by the defendant's counsel, but which do not materially change the aspect of the case. The drafts forwarded in November were at one time credited in an account current, but were taken out upon the re-statement of the account upon which the request was based, as they were never operative against the company, or any one, the auditing them was simply an error in book-keeping, which did not prejudice the defendant. Upon a review of the whole case my conclusion is that the defendant had no defense to the claim upon which the judgment was recovered, and that we should not be able to reverse it if the review had been upon the facts.

Affirmed.

LUCRETIA VROOMAN, by Sherman Armstrong, Jr., her next friend, Respondent, v. JOHN GRIFFITHS, Appellant.

A wife owning a farm, purchased with her own money, can employ her insolvent husband to work the same without impeaching her title to the issues and profits of the same.

It is in the discretion of the court or referee, to permit leading questions to be put to witnesses by the party calling them, though the opposite party object, and except to the same.

The wife owning a farm is as much entitled to the issues and profits thereof when worked by her insolvent husband, as when worked by any other insolvent. BALCOM, J.

THIS action was brought in the Supreme Court for the alleged wrongful taking and conversion by the defendant of the following property, which the plaintiff claimed was her "sole and separate property," to wit: three cows, two three year old steers, one yearling steer, three calves, one bull, one lumber wagon, one pleasure wagon, one pair of bob-sleighs, one set of double harness, two plows, two drags, one hay-rigging and one colt. The defense was, that the property belonged to Christian B. Vrooman, the husband of the plaintiff; and that the defendant was the sheriff of Ulster county, and took and sold the property by one of his deputies, by virtue of an execution against the property of Christian B. Vrooman, in favor of one Knapp, and that such execution was issued on a valid judgment in favor of the latter against the former, for $939.45, which was docketed in Ulster county on the 28th day of June, 1852.

The action was tried before a referee. The plaintiff proved that in the summer of 1851, David Vrooman, a brother of her husband, gave her $700. That she purchased a farm in the town of Olive, in the county of Ulster, on the 14th day of October, 1851, subject to some mortgages thereon. She paid $100, over and above the mortgages, for the farm and received a deed therefor. She shortly afterward moved upon the farm with her husband and family, where they remained and cultivated and occupied the farm until about the time the defendant, by one of his deputies, levied upon and sold the

above mentioned property, by virtue of the above mentioned execution against the plaintiff's husband in the spring of 1855.

David Vrooman testified, that he sold the pleasure wagon to the plaintiff for $20 after she purchased the farm, and that the wagon was worth $25. He stated that he took the plaintiff's notes for the wagon, which were paid six months or a year afterward. *Thomas Davis* testified, that he sold a brockle-faced cow to the plaintiff in August, 1854, which the defendant took and sold; that the plaintiff herself paid him, Davis, $15 toward the cow the next week after she bought it; that the rest of the purchase price stood a while, when the plaintiff's husband handed the same ($10) to him, Davis, and said, "That makes you and my wife square on the cow." That the plaintiff had previously promised him, Davis, to send him the $10; that this cow was worth $30. *Isaac B. Davis* testified, that he sold a steer to the plaintiff in the spring of 1853, for which, he thought, she paid him in the presence of her husband; that it was taken and sold by the defendant, and was worth $40. *Patrick Kernan* testified, that he sold a lumber wagon and a sleigh that went on to said farm, and was paid for by them in produce of the farm; that the husband of the plaintiff made the bargain for the plaintiff with him for such wagon and sleigh. The plaintiff spoke to the witness about this wagon after he had delivered it, but before he was fully paid for it. Another witness testified, that this wagon was worth $28 and the sleigh $18 at the time the defendant sold them.

The foregoing property was used on the farm from the time the same was purchased until about the time it was seized by the defendant.

The plaintiff's counsel asked a witness this question: "What was a fair rent for the farm per year?" The defendant's counsel objected to the same as irrelevant. The referee overruled the objection, and the defendant's counsel excepted. The witness answered, "It ought to rent for $140 or $150 a year." The witness had previously testified that the plaintiff's husband was engaged in no other business than working that farm while he lived there; that once in a while he

teamed it a little with the horses he had; not enough to make a business of it; that once in a while he would take a load to market.

It must have been evident to the referee that the defendant's counsel had been endeavoring to establish that the plaintiff paid for the pleasure wagon out of the produce of the farm and also lived on such produce. The defense questioned plaintiff's title to the farm and produce as well as her alleged title to the property in question.

The plaintiff admitted that the property in question was levied upon and sold by a deputy of the defendant, by virtue of the above mentioned execution, and that the defendant then was the sheriff of Ulster county.

When the plaintiff rested her case, the defendant's counsel moved for a nonsuit, on the ground that the property in question was the property of Christian B. Vrooman, and not the separate property of the plaintiff. The motion was denied, and the defendant's counsel excepted.

The plaintiff's counsel put this question to Isaac B. Davis: "Did she not pay the money herself for the steer?" The defendant's counsel objected to the same as leading. The referee overruled the objection, and the defendant's counsel excepted. The witness answered, "I think she did."

The defendant proved the judgment on which the execution was issued, and showed that it was obtained upon a former one that was recovered in June, 1841, and that such former judgment was recovered for an old debt. He also proved that the plaintiff was married to Christian B. Vrooman prior to the year 1841, who had been poor from that time.

David Vrooman was re-examined by the defendant's counsel, and stated that the plaintiff told him she bought the farm alluded to, and stocked it with the $700 he gave her; that the plaintiff and her husband had no place to go to, and were poor; that they had not been able to make a living; and he felt as though he could do something for "the family," and thought if he gave money to the plaintiff's husband his creditors could take it away, and the family would not be benefited by it. So he gave the $700 to the plaintiff, and

told her she had better buy land for it. It appeared that the plaintiff's husband had been a merchant, and had failed in business as early as 1841.

The referee found, among other things, that the $700 was given to the plaintiff; that she purchased the farm, and shortly after moved upon it with her husband and family, and continued there until about the time of the levy and sale by the defendant. That the plaintiff purchased and paid for the one pleasure wagon, bought of David Vrooman, worth $20; one cow, bought of Thomas Davis, worth $30; one steer, bought of Isaac B. Davis, worth $40; one wagon and sleigh (paid for by produce raised on the farm), bought of Patrick Kernan, worth $46; which property the defendant had taken and sold. That much, if not all, of the other property, mentioned in the complaint, was shown to have been bought or made by the plaintiff's husband, in his own name, and for his own use. His conclusions of law were as follows: "I find as conclusions of law, that the plaintiff having received the $700, by gift from a person other than her husband, after the passage of the act 'for the more effectual protection of the property of married women,' can hold the property in which she invested it, and its 'rents, issues and profits;' and the same is not liable for her husband's debts. That property bought by the husband with the proceeds of the labor of himself, wife and family, is his, and the presumption is in favor of the husband owning the personal property on the farm worked by him, when he has the management and control of it. That such presumption in this case has been overcome as to the property hereinbefore enumerated, but not as to the residue; and that the plaintiff, accordingly, is entitled to judgment for $136, with interest from April 11, 1855, amounting in all to $155.30."

The case states that, "the defendant's counsel duly excepted to each and every of the conclusions of the law stated in said report."

Judgment was entered upon the decision of the referee, against the defendant, with costs. He appealed to the General Term of the Supreme Court, in the third district,

where that court held the plaintiff was not entitled to recover for the lumber wagon and sleigh that were "paid for by produce raised on the farm," worth $46; and reduced the judgment to $102.81. The defendant then appealed from the latter judgment to this court.

A. J. Parker, for the plaintiff.

Samuel Hand and *John K. Porter*, for the defendant.

BALCOM, J. The question presented by the motion for a nonsuit is, whether the evidence justified the referee in holding that any portion of the property which the defendant had taken and sold, belonged to the plaintiff. If it did he properly denied the motion; but if it did not he should have granted it.

The plaintiff did not prove where she obtained the identical money she paid to David Vrooman for the pleasure wagon, or to Thomas Davis for the cow which she purchased of him, or to Isaac B. Davis for the steer she had of him. But she proved that a brother of her husband had previously given her $700; and she had paid only $100 toward the farm which she bought in the town of Olive, and she was entitled to the rents, issues and profits of such farm "in the same manner and with like effect" as if she had been unmarried; and those rents, issues and profits were not liable for the debts of her husband. (Laws of 1849, p. 528, chap. 375.) She also showed that her husband was poor; and David Vrooman testified he did not think her husband had $2 in the world when he sold the pleasure wagon to her. These facts clearly authorized the inference that the plaintiff paid her own money for the pleasure wagon, cow and steer; and they justified the referee in holding that those articles were the property of the plaintiff at the time the defendant took them and sold them. The fact that her husband used them in carrying on her farm, for the benefit of himself and children, as well as herself, did not render them liable for his debts, or deprive her of the right to sue for the same when taken from the possession of her husband and converted without her consent. (*Sherman* v. *Elder*, 24 N. Y., 381.)

These views not only lead to the conclusion that the referee properly refused to nonsuit the plaintiff, but also show that the plaintiff was entitled to recover the value of the pleasure wagon, cow and steer.

We need not determine whether the plaintiff was entitled to recover the value of the lumber wagon and sleigh purchased of Patrick Kernan, and "paid for by produce raised on the farm;" for she has not appealed from the determination of the Supreme Court rejecting her claim for those articles.

I am unable to see that it was material for the plaintiff to prove "what the fair rent" of the farm was per year. But I am of the opinion the evidence that the farm "ought to rent for $140 or $150 per year," did not prejudice the defendant at all on the trial. It was neither beneficial to the plaintiff nor prejudicial to the defendant. If, therefore, the referee erred in receiving such evidence the error should be wholly disregarded.

It rested in the discretion of the referee, whether he would permit the plaintiff's counsel to put the leading question to Isaac B. Davis, as to who paid him for one of the steers in dispute, and there was no abuse of such discretion.

The finding of the referee that the plaintiff "purchased and paid for" the articles of property, for which she has recovered, was tantamount to finding that she paid her own money therefor and owned the same, for such is the legal inference from these facts.

The facts found by the referee justified all his conclusions of law so far as they were sustained by the Supreme Court.

A wife risks no more by permitting an insolvent husband to occupy her real estate and use and manage her personal property, than a stranger does by permitting a bankrupt to do the like with his property. She is as clearly entitled to "the rents, issues, and profits" of her real estate, and the benefits of the ownership of her personal property, when occupied and used by her insolvent husband, as when occupied and used by any other insolvent person. She is not obliged to turn her husband out of her house, or off her land,

or prevent him using her personal property to save the same and all benefits accruing therefrom, from his creditors. These conclusions are so obviously just, they only need to be stated to be admitted to be correct. They are not only just, but equitable, and also legal.

For these reasons, I am of the opinion the judgment of the Supreme Court should be affirmed with costs.

All the judges concurring,

Judgment affirmed.

MARY STEWART, Appellant, *v.* ANDREW SMITH, Respondent.

No notice is required to be given to the owner of the land, claiming a freehold estate therein, of proceedings to admeasure dower as a mere supplement to an action of ejectment, in which the plaintiff has succeeded in establishing her right of dower.

Such proceeding is governed by the provisions of section fifty-five of the title treating of the action of ejectment. (2 R. S., 303.)

HOGEBOOM, J. It is by no means clear that this order is *appealable.* If it be regarded as in effect an order granting a new trial, then the appeal is ineffectual for want of the necessary stipulation that in the event of its affirmance judgment absolute shall be rendered against the appellant. If it be regarded as made after judgment, then it seems to me questionable whether it is in a special proceeding or upon a summary application in an action after judgment. (Code, § 11.) But as this point has not been discussed by counsel, it may be well to examine the order on its merits.

I think the Supreme Court were in error in supposing that, in a case like this, notice of the proceedings to admeasure dower was necessary to be given to the owners of the land claiming a freehold estate therein. This is not an original proceeding in this court for the appointment of admeasurers of dower (2 R. S. 488,) but a mere supplement to an action of ejectment in which the plaintiff has already succeeded in establishing her right to dower. The case is, therefore, governed by the provisions of section 55 of that title of the

Revised Statutes which treats of the action of ejectment, (2 R. S., 303, 311, 312, §§ 48, 50), and not by the title before quoted.

It is reasonably clear that this section contemplated a proceeding by, and notice only to the parties to the action. It is but the sequel to the action of ejectment. It declares that upon the filing of the record of judgment, the court, upon the motion of the *plaintiff*, shall appoint commissioners to admeasure the dower; and that their report may be appealed from by any *party to the action.*

And although the section declares that the commissioners shall have like powers and obligations and proceed in like manner as commissioners appointed pursuant to the seventh title of the eighth chapter of the act (being the title before quoted), this does not, I think, mean that their appointment shall be *procured* upon a similar notice. The parties are in court who are to be affected by the assignment of dower. The statute requires the ejectment proceedings to be against the party in possession, but if he be a mere tenant, he is obliged by law to give notice of the action to his landlord, and is subjected to a heavy forfeiture if he do not. (1 R. S., 748.) The landlord may be let in to defend. (2 R. S., 342.) He usually does so. He did so in this case, as is sworn to in the papers on the part of the defendant. The attorney in the suit, therefore, to whom notice is given is his attorney, and he has had the opportunity to defend both the ejectment suit and the subsequent proceedings to admeasure dower.

It has also been held, or, at least, intimated, in a reported case in this court, that in these proceedings notice is not necessary to any one except the party to the action. (*Ellicott* v. *Motier*, 3 Seld., 206.)

But, although the Supreme Court set aside the report mainly upon this ground, it appears from the opinion of the court at General Term, that they affirmed the order of the Special Term in part, upon the ground that the report was wrong upon the *merits*, or in regard to the *mode* of admeasurement. They say: "We think, also, the commissioners erred in assigning the dower so as to render the buildings

almost useless to both parties." We may conclude that the court at Special Term was influenced by like considerations They had the statutory right to set aside the report on this ground (2 R. S., 490, 491), and if we have the right to review that question on this appeal, I am of opinion that the power was judiciously exercised, and that the mode of assigning the dower was inequitable and injurious, and could have been performed within the principle of the reported cases (*White* v. *Story*, 2 Hill, 544; *Coates* v. *Cheever*, 1 Cowen 463) in a much more just and judicious manner. On that ground I am inclined to affirm the substance of the order.

If the order appealed from had been simply an affirmance of the order at Special Term, that would have been all which it would have been necessary to say. But the court, acting, doubtless, upon the idea that the proceedings were fatally defective unless notice was served upon the owners of the freehold, annexed this clause to the order of affirmance: "and that the proceedings be dismissed unless petitioner elects to amend within ten days from the entry of this order." I think this clause was erroneously inserted; and that so much of the order appealed from should be *reversed*, and the residue *affirmed*.

As both parties are in fault, I think neither should recover costs against the other on this appeal.

All concur.

Affirmed.

JOEL TIFFANY, *State Reporter*.

JOSEPH COLWELL, Assignee, etc., *v.* WILLIAM BLEAKLEY, Jr., Sheriff of Westchester county.

To make a judgment an estoppel to proving certain facts in a subsequent case, it should be made to appear upon what grounds the prior verdict and judgment proceeded.

HOGEBOOM, J. The plaintiff is the assignee of Bunce, Esler & Cobb, and brings this action against the sheriff of Westchester to recover damages for a false return to an execution issued to him upon a judgment recovered by Bunce, Esler & Cobb against the New York Steam Mill and Machine Company. This judgment was obtained on the 31st day of March, 1860, for $2,513.58, and execution was issued thereon on the same day, upon which, about the same time, the sheriff levied on personal property of the value of several thousand dollars, but subsequently returned the execution unsatisfied. The plaintiff gave *prima facie* evidence sufficient to show that the New York Steam Mill and Machine Company were in possession of the said property, and the apparent owners thereof.

The defense set up in the answer of the defendant was in substance that this action was defended by Alfred Booth; that the property in question, prior to the incorporation of the New York Steam Mill and Machine Company, belonged to Montgomery & Lund, who organized the company in question and transferred to it all their property for the purpose of defrauding their creditors, but in reality for their own benefit. That Booth, on the 17th day of December,1859, recovered a judgment against Montgomery and Garrabraat for $2,224.80 and issued an execution thereon on the 20th of the same month to the sheriff of Westchester, under which the sheriff sold to him all the property now in question and also a steam engine, which engine Booth afterward took to New York; and while there it was levied upon and sold under an execution in favor of Bunce, Esler & Cobb, and purchased by the latter firm; that Booth thereupon commenced an action in the Supreme Court against Bunce, Esler & Cobb and other

persons who indemnified them, to recover the value of said steam engine, and after a litigation obtained judgment therein in his favor. He therefore claims that the plaintiff, who succeeded to the rights of Bunce, Esler & Cobb, is estopped by the judgment in that action from recovering in this action against the defendant, who is represented here by Booth. But the defendant did not, on the trial of this action, prove all the foregoing facts.

The only material facts proved on the defense were, that Booth was the indemnitor of the sheriff; that the parties to the former suit *claimed* the steam engine in the modes hereinbefore stated, to wit: The plaintiff therein as the judgment creditor of Montgomery and Garrabraat, and as the purchaser of the property on execution issued on that judgment; the defendants therein as the judgment and execution creditors of the New York Steam Saw-Mill and Machine Company, under the judgment before mentioned; that the jury rendered a verdict for the plaintiff on which judgment was entered; from which judgment an appeal had been taken to the Court of Appeals. The judgment roll in that action was also introduced in evidence, having been filed in Orange county on the 25th of October, 1862; but the contents of the judgment roll are not set forth in the case.

On this evidence the defendant claimed that the recovery of the latter judgment was a bar to this action, and on that ground moved to dismiss the complaint; which motion the court granted, and directed the jury to find a verdict for the defendant. The plaintiff's counsel excepted. An appeal is now taken to this court.

The point principally discussed here is, whether the appeal taken from the judgment in question deprives it of its force as an estoppel. But, independent of that question, I think the nonsuit was erroneously granted.

1. I think it does not sufficiently appear that the verdict of the jury was founded upon the fact that the organization of the Steam Saw-Mill and Machine Company was a fraudulent contrivance by Montgomery and Lund, for the purpose of defrauding their creditors, and, therefore, void as against

the plaintiff in that action. The proof is that such a claim was set up on the trial. It is not shown that there was evidence to support it; it is not shown (for the pleadings are not before us) on what ground the defendants in that action defended the same; nor on what ground the verdict of the jury proceeded. The effect of that judgment as an estoppel depended upon the proof of facts extrinsic to those which appeared in the judgment record, and they were not sufficiently established.

2. But a more decisive objection consists in the fact that, assuming the fraudulent purpose of Montgomery and Lund in organizing the Steam Saw-Mill and Machine Company, and, therefore, that it was ineffectual against their creditors; there was still an interest in the property, to wit: the interest of Lund, which was not reached by the execution of Booth, and which was reached by the execution of Bunce, Esler & Cobb. The defendants in Booth's execution were Montgomery and Garrabraat, and not Montgomery and Lund. Lund had transferred his interest in the property to the Steam Saw-Mill and Machine Company, against which the execution of Bunce, Esler & Cobb was issued; and there were no creditors of Lund to dispute the validity of such transfer. That interest being subject to levy and sale under that execution, the sheriff was bound to seize and sell it, and not return the execution unsatisfied.

If it be said the same fact must have appeared in the former suit and in such an event would have led to a diminution of the recovery, the answer is, we are not in possession of facts transpiring on that trial, to show that such was not the case. We do know from the proceedings which have come up to us on appeal in that case, that such deduction should have been made if it was not, and that probably an error was committed in that respect, on the trial of that cause. At all events it is quite apparent in this case that there was such an interest, which the execution in the Booth suit could not legally seize.

If these views are well founded, they must lead to the reversal of the judgment, independent of the question of the effect of the former judgment as an estoppel.

There will be no reason to regret such a result if it is now legally attainable, inasmuch as we have already decided to reverse the judgment in the action of Booth; and when judgment shall be perfected on the result of that appeal, it will necessarily deprive the judgment which has been pleaded as an estoppel, of the conclusive character attributed to it. This would probably lead to some application to the Supreme Court in this case, when it shall be recalled to that tribunal, to obtain in some proper way the benefit on this suit of the reversal of the judgment in that suit — a benefit to which the party would be equitably entitled.

I am for reversing the judgment of the Supreme Court, and ordering a new trial, with costs, to abide the event.

XAVIER HOCHREITER, Plaintiff in Error, *v.* THE PEOPLE, etc., Defendants in Error.

Statements made in the presence of the prisoner, in the absence of other proof, are to be presumed to have been made in his hearing.

An objection by prisoner's counsel to an inquiry by the prosecution as to what was said and done by a third party in the *presence* of the prisoner, without specifying the nature or ground of the objection, is too general to be available.

DAVIES, J. The plaintiff in error, was indicted in the New York Oyer and Terminer, for the killing of one Leonard Gemder, and convicted of the crime of murder in the second degree. Upon the trial one Lenin, a policeman, testified that he arrested the prisoner and his son in the street, and took them to No. 148 Essex street, in the city of New York, where the deceased then was, but he was too far gone to recognize any one. At that place they met one Enger, who was a witness on the trial, and the district attorney asked Lenin this question, "What did Enger say and do in the presence of the prisoner?" The prisoner's counsel objected to the question, and the court overruled the objection, and allowed the question to be answered, and the prisoner's counsel excepted. After the question was answered, the district attorney put to the witness this question, "Did Enger make any motion, and if so what?" The prisoner's counsel objected to this question, and the court overruled the objection, and the counsel excepted. The witness answered that he threw up his hands. No ground of objection is stated to either questions in the bill of exceptions, and the counsel for the prisoner contends on the argument that he was now at liberty to assume any ground of objection; and he now argues that the first question was objectionable on the ground that it did not limit the inquiry to what was said and done in the hearing of the prisoner. It is to be observed that the question called for not only what was said in the presence of the prisoner, but what was done in his presence. I do not understand the prisoner's counsel now to argue that it was not legitimate to prove what Enger did in the presence of the prisoner, but he contends that by possibility what was said in his presence might not have been said

in his hearing. A portion of the question, that is, what was done in the prisoner's presence, it is not questioned, was legal and proper, and if the other portion, what was said in the prisoner's presence, was objectionable on the ground that it was not said in his hearing, that objection should have been pointed out upon the trial. The exception is to the question, what was *said and done* by Enger in the presence of the prisoner—covering, therefore, both branches of the inquiry. The latter portion is conceded to be legitimate, and the former portion is also conceded to be proper if it had appeared that what was said was said in the hearing of the prisoner. This objection, to have availed the prisoner, should have been specifically pointed out on the trial, and as the exception covers clearly what was a legitimate inquiry, it cannot be questioned. But it may well be questioned, whether the whole inquiry does not clearly indicate that it pointed to what was said in the hearing of the prisoner. He was then present, and any inference would be in the absence of any countervailing circumstance, both from the question and the answer that the conversation inquired about and detailed were in the hearing of the prisoner. In *Rex* v. *Bartlett* (7 Carr. & P., 832), Greaves, for the prosecution, was proceeding to detail the anticipated proof on the trial, and stated that a portion of such proof would consist of what the wife of the prisoner said in his presence, and the same was objected to, and BOLLAND, Baron said he had no doubt the evidence was admissible. I have no doubt that it was competent for the district attorney to show what was said in the presence of the prisoner, and the inference is irresistible, in the absence of any circumstance tending to raise a contrary presumption, that what was said in the prisoner's presence was also said in his hearing. If it was not it was competent for the prisoner to rebut the legitimate inference that he was so circumstanced that he did not, or could not have heard what was said. The general objection to the question was properly overruled.

The second question was proper enough in itself, for it might have elicited an answer, tending to show the guilt of

the prisoner. The answer indicates clearly that it produced no harm to the prisoner, as the act of Enger in throwing up his hands was entirely immaterial and of no significance whatever. As the objections to these two questions are the only ground relied upon by the counsel for the prisoner, to procure a reversal of the judgment of affirmance of the conviction of the plaintiff in error, and as we have seen that both objections are untenable, it follows that the judgment of the Supreme Court must be in all things affirmed.

HOGEBOOM, J. The plaintiff in error was tried and convicted of murder in the second degree in the New York Oyer and Terminer, in January, 1861. He brings a writ of error to reverse the judgment there rendered, and alleges that evidence was improperly received at the trial, in two particulars: first, evidence of the declaration of a third person (Enger) immediately after the occurrence in the presence of the prisoner, to wit, that the prisoner was the person who stabbed the deceased; second, evidence of an act or motion of such person under like circumstances, to wit, that Enger threw up his arms. This evidence was admitted in reply to the two following questions: 1. What did Enger say and do in the presence of the prisoner? 2. Did Enger make any motion, and if so, what? I think neither of the exceptions are well taken.

It is supposed the first question was inadmissible, because it did not inquire *in terms*, upon the face of the question, as to a declaration made in the *hearing* as well as in the *presence* of the prisoner. The answer is, that if in the presence of the prisoner it is presumed to have been in his hearing also. The former, in the absence of evidence to the contrary, implies the latter. If there were any doubt about it on the facts appearing in the case, the counsel for the prisoner should have objected on that ground, or asked the court for permission to make the fact explicit by evidence one way or the other, and the court would unquestionably have allowed such examination, or required the question to cover such ground. But the objection to the question was general, leaving naturally the impression upon the mind of

the court that it was the declaration itself, and not the circumstances under which it was made, which constituted the point of the objection.

The case of *Ward* v. *The People* (3 Hill, 395), is not in point to support the validity of this objection. There a question, the competency of which was neither urged nor objected to except on general ground, was excluded at the trial, and the court of review, sustaining the decision of the court below, said "any objection may be urged to it here that could have been taken on the trial." In other words, a party offering evidence which is excluded must, on appeal, be able to show that there is no just ground for its exclusion. Here the evidence was admitted, and the general objection overruled, and properly: first, because in any aspect of the case the question was admissible, as by necessary implication embracing the fact supposed to be omitted; and, secondly, because if the question were objectionable, it was so only in a partial and circumstantial sense, which the generality of the objection tended to conceal rather than disclose.

The other exception is equally untenable. I do not know why an *act* of a third person done in the presence of the prisoner, is not equally admissible, as a *declaration* made in his presence, provided the nature of the act may be supposed likely to have shed some light upon the nature of the offense, or the guilt of the person. To either, or both, the prisoner would have an opportunity to furnish an explanation if he desired. In this case the court was at liberty to presume an objection made before the question was answered, that the answer might furnish pertinent evidence in the case, and although the answer actually given, to wit: that he (the third person) threw up his arms, does not seem to shed much light on the case, it was not subsequently objected to, nor asked to be stricken out, and it could not possibly have operated to the legal prejudice of the prisoner.

MULLIN, J., dissented, and read an opinion in favor of reversal. All the other judges being for affirmance.

Judgment affirmed.

HARVEY WARD, Respondent, v. CORNELIUS VANDERBILT, Appellant.

Where there is sufficient evidence to satisfy the jury that the plaintiff became sick and lost his time, by reason of the negligence of the defendant as a common carrier of passengers, carrying the plaintiff for hire, they may make an allowance for the value of the plaintiff's time, though he has submitted no evidence upon that point.

BALCOM, J. The facts in this case are substantially like those in *Williams* v. *Vanderbilt*, decided at this term of the court. The requests that the defendant's counsel made upon the judge, to charge the jury, do not make this case materially different from that brought by Williams, *supra*. Those he first made were: 1. That the testimony did not establish that the defendant was a common carrier from New York to San Francisco. 2. That the testimony did not establish any violation or neglect of duty on the part of the defendant. 3. That upon the whole evidence in the cause the plaintiff was not entitled to recover. I am of the opinion the judge properly refused to charge either of these requests. There was sufficient evidence to make it his duty to submit the questions to the jury. 1. Whether the defendant was a common carrier of passengers from New York to San Francisco. (17 N. Y., 310.) 2. Whether he was guilty of neglect or violation of duty to the plaintiff. 3. Whether, upon the whole evidence in the cause, the plaintiff was entitled to recover.

The judge rightfully refused to charge the jury: that there was no evidence that the sickness of the plaintiff was occasioned by any fault of the defendant or his agents, and that the plaintiff was not entitled to recover damages for it. He also rightfully refused to charge them: that there was no evidence that the loss of time by the plaintiff was occasioned by the fault of the defendant; that there was no evidence of the value of the plaintiff's time, and that the plaintiff was not entitled to recover for loss of time. The fact that there was no evidence of the value of the plaintiff's time did not preclude the jury from giving him such compensation therefor as they deemed was reasonable. There was sufficient

evidence to make it the duty of the jury to determine whether the plaintiff's sickness and loss of time were occasioned by the fault of the defendant, his agents or servants. And if the same were so occasioned, the plaintiff was certainly entitled to compensation therefor.

The other requests of the defendant's counsel were as follows, to wit: "The plaintiff is not entitled to recover his expenses incurred after receiving notice of the loss of the North America, and before commencing his journey home. The plaintiff is not entitled to recover the expenses of his return. If the jury find that the damages sustained by the plaintiff were occasioned by the loss of the North America, and that loss occurred before the plaintiff engaged his passage, but both plaintff and defendant were ignorant of the loss, and dealt in good faith, then the dealing was based upon a mistake of fact, and the plaintiff is not entitled to recover in this action. Where a person engaged in the business of transportation, advertises or holds out to the public that he will carry passengers generally, between two ports or places, without disclosing the means of conveyance to be used for such carriage, he is bound, in case of the loss or destruction of the conveyance to which the passenger is assigned, to supply another conveyance, if one can be supplied by reasonable diligence. But where the carrier holds out to the public, and notifies the passenger applying for passage, that he will carry the passager by a particular conveyance, which is described and designated, the undertaking of the carrier is restricted to that conveyance, and in case of the loss or destruction of that conveyance, without negligence and by the act of God, the carrier is discharged from all liability, further than to return the passage money." These requests were properly refused for the reasons assigned in my opinion in *Williams* v. *Vanderbilt* (*supra*), and the authorities therein cited.

The judgment in this action should therefore be affirmed, with costs.

ROSEKRANS and MARVIN, JJ., expressed no opinion, all the other judges concurring.

Judgment affirmed.

THE PENNSYLVANIA COAL COMPANY, Respondents, v. THE PRESIDENT, MANAGERS, ETC., OF THE DELAWARE AND HUDSON CANAL COMPANY, Appellants.

Where the issue is such that a party is entitled, on proper demand, to have the same tried by jury, and he omit to claim such right, he cannot afterward on appeal, object to the mode of trying such issue.

Where the complaint and prayer thereof are such as to embrace both equitable and legal remedies, the defendant may move the court to compel the party to elect on which part of the case he will proceed, or for which mode of trial or resulting relief he will go.

Or the court may strike out or dismiss that part of the complaint seeking mere equitable relief, leaving the remaining issues of fact to be tried by a jury.

The meaning and application of the term "*toll*" discussed by EMOTT, J.

Before a party has a right to detain for the payment of toll, the amount to be paid must be fixed and ascertained.

THIS action was brought by the Pennsylvania Coal Company, against the Delaware and Hudson Canal Company, in May, 1852.

The complaint alleged, that in August, 1847, the defendants entered into a contract with an association, known as the Wyoming Coal Association, to furnish transportation on its canal, to the boats of the association carrying coal.

The provisions as to compensation which the contract contained, were as follows:

The said canal company, its successors etc., charging and collecting a toll on the coal transported in pursuance of the agreement at a rate per ton, to be established in the manner following, viz.: On the first day of May, in each and every calendar year, the quantity of lump coal of the said Delaware and Hudson Canal Company, which shall at that time have been sold to, or delivered at Rondout, and to arrive by the said canal during the said calendar year, shall be ascertained; and from the average price thus ascertained, two dollars and fifty cents shall be subtracted, and one-half the remainder shall be the toll per ton, during such calendar year; except that if any discount or deduction, contingent or otherwise, shall be agreed upon, or contemplated in the contracts for

such cases, the said toll shall be reduced correspondingly to such discount or deduction as shall actually be made; but provided, nevertheless, that if, on the first day of May, in any calendar year, the quantity of lump coal of the said Delaware and Hudson Canal Company, which shall at that time have been sold, as aforesaid, shall be less than one-half of the estimated sales for one year, the toll during such year shall be calculated in the manner hereinbefore provided, on the average price at which the sales of lump coal for such year shall be actually made.

The complaint alleged that, in the year 1851, the plaintiffs acquired the rights of the Wyoming Coal Company in this contract, and were substituted for that company.

That in the then current year 1852 the contingency contemplated by the last proviso in the contract had occurred. The quantity of coal sold, or contracted to be sold, by the defendants on the first day of May in that year, was not one-half their estimated sales for the year, and therefore the toll was to be fixed upon the average price of the actual sales, and the plaintiffs insist that by the true construction of the contract, the toll is not demandable until the time when its true and proper amount can be determined according to the contract.

That the defendants, however, insist that tolls must be paid them at the time of the passage of its boats, and that they threaten to arrest and have arrested plaintiffs' boats.

The complaint states the negotiations between the parties and various facts as to their respective creditors' business, and the inducements for making the contract. The complaint prays an injunction forbidding defendants from withholding the use of their canal, and from hindering and delaying boats of the plaintiffs, and for other relief.

A supplemental complaint was put in, averring that defendants had put their order in force and had detained plaintiffs' boats. The consequences of such detention and the injury to plaintiffs were set out in detail, and plaintiffs asked for damages.

The defendants answered, denying plaintiffs' corporate capacity and interest in this contract. Admitting the prin-

cipal facts alleged, but denying various matters stated as to the registration, etc., and controverting the construction of the contract claimed by plaintiffs.

There was a preliminary injunction issued, which was dissolved or entered, and no appeal was taken from this order.

The cause was tried before Judge DAVIES, who decided in favor of the defendants' construction of the agreement, and dismissed the complaint. An appeal was taken from this judgment, and it was reversed. A second trial was had before Judge SUTHERLAND, who gave judgment for the plaintiffs, with costs.

The judgment declared the construction of the contract to be what the plaintiff claimed, and adjudged them damages; but ordered an injunction.

At the trial the acts incorporating plaintiffs and the contracts set forth in the complaint were proved. The plaintiffs proved, under objections and exceptions, damages to $1,000 by the detention of their boats for the payment of toll of 50 cents per ton claimed by defendants. They proved the time of opening the canal for every year since 1832 to 1860. They also introduced an agreement between the two companies, made in 1849, for joint management and sale of their coal, only to be made by the defendants. The agreement stipulated that either party might terminate the arrangement by notice, and that in 1851 plaintiffs gave such notice.

The plaintiffs rested on this proof.

Defendants then insisted that they had a right to insist on prepayment of tolls, and to prevent the passage of boats through the weigh-lock until they had prepaid their tolls; and, 2. That if the plaintiffs were right they had an adequate remedy by action at law triable by jury; and, therefore, moved for a nonsuit, which was denied and exception taken.

Defendants then gave in evidence their own acts of incorporation, etc., also various letters—the length of the canal—the time when the use of this canal commenced under the contract between these parties in 1850—the establishment of a weigh-lock at Hawley in 1852, and the rules and regulations of the canal from 1843 to 1846. They also proved that the

average price of the actual sales by them, in 1852, was $3.64 per ton. The judge found as facts, that on May 1, 1852, the coal sold by defendants was less than half their estimated sales for the year, and that the average price of sales for the year was at least $3.84, but such price was not ascertained or ascertainable until the close of the year.

As law he found: 1. That by reason of the impracticability of ascertaining the average price of all the sales by May 1, or before the end of the year, defendants were not entitled to charge or collect any toll for coal transported until the end of the year. 2. That although it appeared that the toll collectible by the agreement did actually exceed 50 cents per ton, yet the defendants were not entitled to insist upon or collect the same before the end of the year. 3. That on these facts plaintiff was entitled to damages. 4. That these damages were $1,000.

The defendants excepted to these conclusions of law.

From the judgment at Special Term the defendants appealed to the court at General Term, where the judgment was affirmed, and they appealed to this court.

John K. Porter, for the appellants.

Amasa J. Parker, for the respondents.

EMOTT, J. It is not necessary in the present condition of this case and controversy to determine whether the plaintiffs upon the facts proved, and assuming their construction of the contract to be correct, could maintain an action to enforce its performance, or to enjoin the defendants against its violation and in unjustly excluding the plaintiffs' boats from their canal. The preliminary injunction which was granted in this aspect of the case was vacated upon motion, and no appeal was taken from the order dissolving it. The supplemental complaint asked for damages for an actual breach of the contract, and the judgment responded to this demand and gave the plaintiff a money recovery only. If the plaintiffs had brought precisely and merely such an action as the defendants insist this should have been it would have

resulted in a similar judgment. The only difference in the case would have been in the mode of trial. The question of fact as to the amount of damages would in that event have been submitted to a jury. But upon the case before us the mode of trial was immaterial, since the case states that damages to the amount recovered were proved without dispute, if the plaintiffs were right in law and entitled to damages at all.

The defendants, however, are not in a position to avail themselves of any objection to the judgment founded on the mode of trial. They did not apply to have the issue of fact tried by a jury, but moved at the trial to dismiss the complaint and terminate the suit altogether. The complaint contained allegations and a prayer for both equitable and legal relief. Conceding that the plaintiffs were entitled to one and not the other, the defendants should have asked the court below to compel the plaintiffs to elect on which part of the case and for which mode of trial and resulting relief they would go, or to strike out or dismiss that part of the complaint seeking merely equitable relief, leaving the residue presenting a case triable by jury.

Still, I deem it not improper to say that, in my judgment, this action could have been maintained in its equitable aspect if we assume that the plaintiffs are correct in their construction of the contract. I understand the learned counsel for the defendants substantially to concede as much, provided the agreement upon such a construction of it be not unreasonable or unconscionable, as he insists that it is. And I allude to this aspect of the case more particularly to say that I do not perceive the unreasonableness or unfairness of such a contract between these parties as the plaintiffs claim that they have made.

The defendants, when this agreement was entered into, were the owners of a canal whose capacity was, or was supposed by them to be more than adequate to the transportation of all the coal which their own mines could produce, or their own boats deliver At the same time it was evident that the canal would never be required or used to any great

or remunerative degree for the carriage of passengers or of any other article than coal. It was therefore eminently desirable for the defendants to secure additional coal trade and transportation, and to induce other producers of coal to make use of their canal and to construct other communications connecting with it.

Perhaps it would not have been an unreasonable arrangement for them, in order to secure such a business, to contract expressly that the payment of their tolls or charges should be postponed in all cases until the end of the year, or some period after the passage of the boats. At least a court could not pronounce against such a contract, as so unfair as to be unfit to be aided or enforced. The counsel for the defendants assumes that his clients intended to make their tolls or charges payable in advance in all cases, and failed to do so in the contingency which happened in 1852, if they have failed, from inadvertance or mistake. But there is no evidence upon which to found any such assumption. There is no proof of the intention of the parties except what is to be found in the instrument itself, nor are there either allegations or proof that they have inadvertently or mistakenly made it what it is. It might of course have been more to the interests of the defendants to have had a contract distinctly providing for the prepayment of toll in all cases, but so would a higher toll have been more for their interest. We cannot presume that they intended or supposed they had made an agreement more beneficial to themselves than that into which they actually entered. Its provisions do not, upon any interpretation contended for here, shock our sense of fairness and justice, and our duty is to enforce them when we have determined what they are.

It will be observed that there is no express or formal covenant or promise in this agreement by the Pennsylvania Coal Company to pay a toll, and what is more important there is no time stated when it is to be payable. There are three measures of the amount of toll given; first when the Delaware and Hudson Canal Company sell or contract to sell before the first day of May in any year, coal to the

amount equal to at least half their estimated sales for the year. In that case the rule is that two dollars and fifty cents is to be deducted from the average price of such sales, and one-half the residue is to be the toll per ton. Second, when the Delaware and Hudson Canal Company do not make sales of coal previous to the 1st of May to an amount equal to one-half their expected deliveries. In this event a similar computation is to be made to ascertain the toll, but the basis is to be the average of actual sales by the Delaware and Hudson Canal Company for the year.

A third case is where the Delaware and Hudson Canal Company make no sales whatever during the year. In this event the toll is to be calculated on the sales for the year of the Wyoming Association, or of their assigns, the Pennsylvania Coal Company, in the same manner as in the second case upon those of the Delaware and Hudson Canal Company.

It may be conceded that in the first of these three cases, the tolls are demandable and payable at the time of the passage of the boats. But this is not merely from the effect of the use in the contract of the words, "charging and collecting" by the canal company, nor from the effect of the word "tolls" in the contract, in describing the compensation for the use of the canal. Nor can these words or phrases control the context so as to compel a payment in advance, which would otherwise be deferred. The defendants' canal was a public highway, constructed under authority of the State, and by an exercise of its rights of eminent domain, and of course open to the use of all citizens upon making suitable compensation to the company constructing and owning it. They were authorized to exact this compensation by tolls, to be paid at the time of passing or using the locks, and not to exceed a fixed rate or amount. The charter of the company (Laws of 1823, ch. 238, § 12) authorized them to "demand and receive" of any boat passing their canal, "such tolls and rates as the managers shall think proper, at any lock or other convenient place," but not to exceed eight cents per mile per ton for coal, and half that sum for other loads. The next section expressly authorized the company to stop

or detain every boat until the master or owner should pay the toll. The length of the canal is ninety-five miles, and the toll or charge thus given by statute would be much larger than that stipulated by this contract could probably reach. If the plaintiffs had placed their boats upon the canal without any special agreement as to its use and the compensation therefor, they would of course have been subject to the tolls authorized by law, and the canal company would "charge and collect," or "demand and receive" these tolls (the phrases may be considered equivalent) and might enforce their payment at once by detention. Even in this case however it does not follow that the tolls must be demanded and collected at the time of the passage of the boats, or not at all.

The persons using the canal which is the property of the defendants, would be liable to an action at common law for compensation for such use, and the statute tolls would afford the measure of that compensation. The additional remedy by detaining the boat in its passage did not deprive the canal company of their right to an action to recover their tolls. (*Jordan & Skaneateles, Pl. R. Co.* v. *Morley*, 23 N. Y., 552.) The plaintiffs are liable at common law for the use of the defendants' canal, and the measure of this compensation is the toll or price agreed upon between the parties. This price was due whenever the agreement fixed it, and collectible or recoverable by action if not paid when due.

Nor do the words charging and collecting in this contract, any more than the equivalent words "demand and receive" in the statute, exclude the idea of collecting compensation at a future day, or the obligation of the plaintiffs to make such subsequent compensation, nor would it be contended that they limit the defendants to the special remedy of detaining or excluding boats. Nor, again, can I accept a similar conclusive inference from the use or signification of the word "toll." Toll is defined to be a compensation or payment in markets and fairs for goods, cattle, etc., bought and sold. (Jacob's Law Dict., Toll.) A tribute or custom paid for passage, or a duty imposed on goods and passengers traveilng public roads, bridges, etc.; a tribute for passage; a reasona-

ble sum due to the lord of a fair for things sold there which are tollable. (Burrill's Law Gloss., Toll, 1; Crabbe Real Prop., § 688.) It is defined by Webster, 1. A tax paid for some liberty or privilege, particularly for the privilege of passing on a bridge, or a highway, or for that of vending goods in a fair, market or the like; 2. A liberty to buy and sell within the bounds of a manor; 3. A portion of grain taken by a miller as a compensation for grinding. The derivation of the word, signifying the cutting or taking off a portion of a thing, points undoubtedly to an immediate payment or exaction, as by a miller from the grain brought for grinding, or by the lord of a fair or market from the prices of articles sold. Yet even in the case of tolls for a market, the proprietor may bring his action and recover them afterward. (*Corp. of Stamford* v. *Pawlett*, 1 Cr. and Jer., 81, and cases cited.) While in the case of a toll for the use of a highway or a bridge the word is used or applied in a manner more remote from its etymological sense and derivation.

It is very true that tolls ordinarily are payable on demand or when the benefit for which they are demandable is received. At common law a distress was incident to toll, or where the toll was for passage or the like, the passage could be refused until the toll was paid. So in charters, as in this case, a right is given to refuse the use of roads or bridges belonging to corporations, although public highways, until the tolls are paid. But it is also implied in all those cases, as will presently be seen, that the amount of such toll is fixed and certain. The argument for the defendants to show that in all the cases specified by the contract now before us, the compensation for the passage of the plaintiffs' boats must be made contemporaneously, rests almost entirely upon the force of the word "toll" in the contract as necessarily importing an immediate payment. It is one answer to this argument that the compensation for which this contract stipulates would be legitimately and properly called toll although not paid or exacted at once. A case might readily be supposed in which the whole compensation for a year's use of the canal

might be payable in gross, as toll for a year, and not tolls for the several passages.

It might depend as to amount upon conditions or contingencies which could not be determined until the end of the year, and for this reason as well as because it was a compensation in gross for the whole period, it might indisputably be payable only at the end of the period. Yet this compensation might properly be termed a toll, at all events in such an agreement as this, and would answer the definitions which have been already quoted, however unusual might be such a method of computation or payment. It is another equally sufficient answer to the argument that whatever may be the ordinary use or acceptation of such a word, it must be construed and qualified in such a contract as this by the circumstances of its connection and use in the instrument. We are not interpreting a grant by the sovereign power of a right to take tolls, leaving the time and mode, and, it might be, the amount of payment, to be ascertained or implied from the mere term itself; but a contract between two parties for the use of the property of one by the other, rendering a compensation which they style a toll, but for the time, manner and amount of whose payment they have stipulated by their contract. Where such stipulations exist, or are necessarily inferable from the positive agreement of the parties, they will necessarily control any mere legal inference from the use of terms or from the ordinary definition of such a word as tolls. Undoubtedly, as the defendants possess the right by their charter to detain boats until the toll or charge for the use of the canal is paid, and as no credit or delay of payment is mentioned in the contract, the stipulated toll is due in every case as soon as the amount is determined.

But toll must obviously be fixed and certain where it is demanded. It is true that when the right to take toll is granted, the amount need not be fixed by the grant, and a grant of a right to take reasonable tolls is valid. (*Corp. of Stamford* v. *Pawlett*, q. s.) But in any case before toll can be exacted, the amount must be determined, either expressly by the grant of the franchise to toll, or by the act or declara-

tion of the party entitled, in the exercise of a discretion conferred, to take reasonable tolls, or by agreement between the parties. In the first case provided for by this contract the amount of toll is rendered certain by the agreement, and therefore it becomes due on demand in the absence of any agreement to postpone its payment.

The proof shows that the canal has for many years been opened for navigation and business about the 1st day of May in each year, not in any year before the 15th of April. Before navigation begins, therefore, the period arrives at which, in the event of contracts by the defendants to an amount equal to half their estimated annual sales, the price is fixed upon which the toll is to be computed, and thus before the plaintiffs' boats would begin to use the defendants' canal, the tolls for its use would be settled for the year and could at once be exacted.

But the question as to the residue of this agreement upon which the parties are at issue is whether when the defendants do not before the 1st day of May in any year make contracts to the extent of half their estimated annual production, or where they make no sales at all during the year, the toll or compensation to be paid by the plaintiffs for the passage of their boats according to this agreement, can be ascertained or determined before the end of the year, and if not, whether any sum can be exacted from each boat when it passes.

The plaintiffs' right to the use of the canal, and the defendants' right to compensation, are both regulated and to be measured by their mutual agreement. It needs no argument to show that when the price of coal by which the rate of such compensation is to be fixed, is the average price of actual sales, either of the defendants' or of the plaintiffs', such compensation cannot be determined until these sales are made. A distinction was attempted between sales for the year, and sales during the year, and it is contended that while the latter signifies all the sales from time to time during the year, the former means sales made to customers to supply their needs during a whole year. There is undoubtedly some force in the suggestion, as also in the fact that while the contract

speaks of sales for the year, it speaks of tolls during the year. There is, perhaps, some implication here that the tolls are to be continually demanded and received, while the sales may be all made at one time, although to supply the needs of a year. But the year thus spoken of is the current business year, or what may remain of it, and not a calendar year from the dates. And the difficulty in making a practical application of this view of the case to the contract, is that there is nothing to indicate at what particular period after the 1st of May, or after what proportion of sales for annual supply have been made, the average of such sales may be taken.

In the first event stipulated by the contract, the average is to be made upon all the sales or contracts made before the first day of May, provided half the production of the company for the year has been disposed of by that time.

If, however, we pass that limit, there is no other date, and no other amount of sales specified, after or upon which such a computation is authorized. Sales or contracts for sales may be made to customers at any time during the year for their supply of coal for the residue of the year.

If contracts for at least one-half the estimated product of the mines of the defendants are not made by them before the first of May, the price of coal by which the tolls are to be computed is to be taken from the average of actual sales.

Even conceding that sales for the year does not mean sales during the year, the contract calls for the average of all these sales. There is nothing in the agreement to show when or by what time short of the whole year they are to be made, or that the computation may be made at any particular period and the subsequent sales rejected from the account.

There is not any point of time fixed for taking the average of actual sales, previous to their entire completion, nor is there anything which authorizes us to assume any period of time before the end of the year, at which we may assume that all the sales of which the average must be taken will have been made.

Whether the expression "sales for the year" means sales to be completed within the year or all the sales made during the year, their average cannot be ascertained until they are made, and of course the tolls to be computed from that average cannot be determined before that time. This renders it impossible to fix the toll to be charged and collected according to this contract, until these sales are made, if not until the end of the year. Certainly it was impossible to fix the toll for the year in which this suit was brought at the time when it was commenced. We must therefore inquire whether, although the amount or rate of toll cannot be determined yet, the defendants may exact a charge estimated to be approximately or nearly what the tolls will be under the contract, before allowing the plaintiffs' boats to pass through the canal. In my judgment the contract does not authorize any such course; it authorizes the defendants to charge and collect certain tolls whenever they are due, and it furnishes the means of settling their amount. But it does not authorize the charge or the collection of any other sums or amounts than these specific tolls. If the amount of the tolls were left at large or to the discretion of the canal company, subject to review or correction, or to drawbacks and deductions afterward, the case would be widely different. But this contract does not provide merely for the payment of a toll to be reasonable in amount, or to an amount to be set by the canal company but not to be unreasonable. It provides for the ascertaining and fixing that toll in a specific manner. It is silent as to the time and mode of payment, and it follows that the toll or compensation for the use of the defendants' property is due when the property is used and the amount of compensation ascertained by the rule of the contract. An uncertainty as to the amount of toll at the time of using the canal, certainly would not avoid the contract, but since the contract contains the means of arriving at certainty as to the payment for which it calls, such payment cannot be compelled until the required return can be made certain by those means.

The clause requiring a reduction of the tolls in case a deduction or discount is made from the price established by the sales or contracts made before the first of May, does not militate against this construction. In some cases these deductions are or can be ascertained with the tolls. The contract speaks of discount or deduction agreed upon or contemplated in the contracts for sale. Even if the discount be contingent yet the contingencies may occur as or before the tolls become demandable. If not, however, still the charge is fixed and declared in the first instance. It is certain at the time when the right to it accrues, even if the defendants are liable to be called upon to make a deduction from it afterward. It is not left uncertain and indefinite until the contingency occurs upon which the plaintiffs are entitled to a reduction or return.

Here, as in the other part of the argument, the main reliance of the defendants is upon the word charging and collecting tolls. I cannot however read these words as meaning charging and collecting compensation for the use of the canal according to the discretion of its owners, until the toll which they are really authorized to exact can be ascertained.

Even if the word toll in its proper sense and use implied immediate payment, yet as I have already said, the manner in which it is used in this contract, would control that sense and give to it a different meaning. A word, ordinarily meaning a sum payable immediately, when used in a connection which involves delay in determining the same, and, hence, in the time of its payment, must acquire a modified sense.

It cannot be construed with such technical exactness as to do violence to the rest of the agreement in which it occurs.

It will be observed that the agreement in question under the construction which has now been placed upon it, does not give to the Pennsylvania Coal Company the option of deferring the payment of all tolls until the end of the year. It is not when they, but when the Delaware and Hudson Canal Company have not made sales before the first of May in any year to the amount of half their estimated production for the year,

that the average of actual sales and not of contracts is made the basis of tolls. It is evident from the case, and is well known to those familiar with the trade, that the manner of conducting it, is by sales contracted to be made in anticipation of the products of the mines, and in large quantities deliverable through the year.

If such contracts are not or cannot be made to any considerable extent, it indicates a dull or diminished demand, or an unsettled market. This would affect both companies alike. The plaintiffs obtain no modification of the terms of the contract in consequence of it, until the defendants have ascertained that their business must yield to such a state of things.

The basis upon which the defendants are to be paid for the use of their canal, is evidently intended to be the price of coal for the current season. That price may be determined by their own sales and contracts, but when prices are so uncertain, or the market so dull, that it cannot, as is usual, be set for the season by contracts in advance, it is not unjust to compel both these parties to submit to the consequences. The defendants will not omit to make early sales in advance according to the common custom of the trade, unless for controlling reasons, such as either the insufficiency of the demand, or the insufficiency of the price at the opening of the season. In either event, if necessity, or a regard for their own interest, prevents the defendants from making their ordinary sales, and so fixing the standard of tolls in any year, the same controlling cause will involve a postponement of the payment of their tolls. The determination of the time of payment is not in truth committed to either party, but is left to events beyond the control of either.

I am of the opinion that the interpretation of this contract adopted by the court below in the last trial of this case, was correct and that this judgment should be affirmed with costs.

Affirmed.

JOHN BINSSE, Executor, and LOUISA LA FARGE, Executrix, etc., of John La Farge, deceased, Appellants, *v.* ALONZO C. PAIGE, THE PRESIDENT, DIRECTORS AND COMPANY OF THE SCHENECTADY BANK, and ELIZA PECK, Trustee, etc., Respondents.

The conveyance of mortgaged premises subject to the mortgage thereon, does not make the grantee of such premises personally liable to discharge the mortgage.

In equity, the question of mortgage is one of intention of the parties.

It seems that a clause in a contract providing that in case any dispute arise, the same shall be settled by arbitrators, is no bar to an action upon such contract.

A trustee receiving his commission cannot charge in addition a counsel fee for himself although he be a lawyer.

THIS suit was commenced in the late Court of Chancery in June, 1846, by John La Farge, since deceased, to procure his release from liability to pay the balances due upon certain mortgages he gave to Gerard W. Morris on three lots of land situated on King street in the city of New York, which balances remained due after a sale of the mortgaged premises pursuant to decrees of said Court of Chancery, and by which decrees said La Farge was adjudged liable to pay said balances, or to have accounts taken of certain rents and profits of the mortgaged premises, which had been received by the defendants, or by Paige for them, and have them applied toward the payment of said balances or deficiencies. The complaint also contained a prayer for general relief. After the suit was transferred to the Supreme Court it was referred to a referee, who made his decision in 1853, by which he determined that La Farge was not entitled to be released from personal liability to pay said balances or deficiencies. He also held that the defendants were entitled to collect under said decrees the deficiency due thereon after deducting therefrom the net amount of rents and profits of the mortgaged premises received by the defendant Paige, less expenses paid by him, and "a reasonable counsel fee to be allowed to the defendants out of such rents," which counsel fee he fixed at $500. He also allowed Paige to deduct out of such rents his actual expenses for stage fare, personal expenses, charges for drawing

leases, charges for insurance, five per cent commissions, and $165.57 commissions for receiving from the master in chancery, who sold the mortgaged premises, and paying over to the owners of the foreclosure decrees the net proceeds of said premises. He fixed the amounts due on the several decrees, and held that the defendants were entitled to executions thereon to collect such amounts. He further decided that the complaint, as to all the relief asked therein, should be dismissed, with costs, and that a judgment should be entered in the suit against La Farge, in accordance with his decision and directions. A judgment was entered in conformity with the decision and directions of the referee, which was affirmed by the Supreme Court at a General Term in the fourth district. The complainant having died, his executors were substituted as parties in his place, and they appealed from the judgment to this court.

All other facts necessary to a correct understanding of the decision of this court are contained in the following opinion:

John H. Reynolds, for the appellants.

A. C. Paige, for the respondents.

BALCOM J. John La Farge executed the mortgages to Morris in 1831, and also bonds for the payment of the money for which they were taken. No person ever agreed with him to pay or discharge the mortgages. He was a defendant in the suits for their foreclosure and was properly adjudged liable to pay any deficiencies there might remain due upon them after applying thereon the net proceeds of the sale of the mortgaged premises.

The correctness of the decrees, when made, is not disputed by the appellants' counsel. But he contends that the purchase of the decrees by Paige, in trust for the Schenectady Bank and Mrs. Peck, and the sale of the equity of redemption in the mortgaged premises from time to time until the same was purchased by Samuel Jones Mumford subject to the mortgages and his grant of the same to Paige in trust for the bank and Mrs. Peck with a general covenant of warranty, before the sale of the premises under

the decrees, shifted the primary liability to pay the balances that remained due on the mortgages and decrees after the sale, from La Farge to Mumford, and entitled the former to require the defendants to apply the avails of all collateral securities they or either of them took of Mumford, for the payment of the decrees, in discharge of the balances due thereon, before they could call upon La Farge to pay the same.

This position is untenable. For La Farge only conveyed the premises subject to the mortgages, and his grantee did not, nor did any subsequent grantee down to Mumford, agree with his grantor to pay the same. The fact that the premises were conveyed subject to the mortgages did not make the grantees liable to pay the same. (*Trotter* v. *Hughes*, 2 Kern., 74.) If the several conveyances had contained words showing that the grantees had agreed to pay the mortgages, the acceptance of such conveyances by them would have bound them to pay the same. But they did not contain words of that import. The decision in *Trotter* v. *Hughes* not only establishes this, but also shows that the agreement of Mumford with Paige to pay the decrees did not release La Farge from his primary liability to pay any deficiencies thereon.

The decrees were not merged by the purchase of them by Paige, though he then was the owner of the equity of redemption in the premises described in them. Paige acted as trustee for the Schenectady Bank and Mrs. Peck, and the instrument that conveyed the premises to him contained a provision that the same was not intended by either party to operate as a merger of the interest he would acquire by taking an assignment of the decrees. Hence there was no merger. (2 Cowen, 246; *Hadley* v. *Chapin*, 11 Paige, 245.)

The declaration of trust, made by Paige, dated the 15th day of July, 1839, in which he stated the purposes for which he took mortgages from Mumford upon the lot fronting on the Bowery in New York city, and on certain real estate situated in Elizabethport, New Jersey, and for which he took the conveyance from Mumford of the equity of redemption

in the mortgaged premises, did not affect the rights of La Farge; and he could not avail himself of it, or use it against the defendants or either of them; for he was not a party to it, and no consideration therefor moved from him. Besides, it did not profess to relieve him from his primary liability to pay the decrees, though the fair inference from it, is that the author supposed, when he executed it, that the mortgaged premises would sell for enough to satisfy the decrees.

The decrees were entered in April, 1839. Nothing was done toward enforcing them until the 25th day of September, 1844, when La Farge gave Paige a stipulation that the latter might sell the mortgaged premises under them, and if the premises should not sell for a sufficient sum to pay the decrees that payment of the deficiency might be enforced against the former, personally, by executions, as directed in the decrees, without making any previous application to the court for that purpose. The stipulation contained a provision for the application of the rents and profits of the mortgaged premises to the payment of any balance that might remain due on the decrees after the sale, similar to that in the bond to which I shall presently refer.

Paige received the rents and profits of the premises as trustee for the Schenectady Bank and Mrs. Peck, while he held the decrees and owned the equity of redemption in the premises prior to the sale; and after the sale, at the request of La Farge, he vacated the docket of the decrees, and La Farge then gave him a bond by which he bound himself to Paige to pay the balance which should remain due on the decrees after deducting therefrom the net proceeds of the sale and the balance of the rents and profits of the premises received by or which had come to the Schenectady Bank or their solicitors, agents or attorneys, or of any person or persons by or on their behalf, or with their permission or assent, etc., after deducting from such rents all legal and just charges and allowances, such balance to be liquidated by a reference to the master in chancery who sold the premises, if the same should not be liquidated by the parties or Court

of Chancery, in case exceptions were taken to the report of the master.

The position of Paige in respect to the title to the decrees and the ownership of the equity of redemption in the premises and his acceptance and use of the stipulation, and his taking the bond bound him, and the other defendants for whom he acted, to allow La Farge, toward the payment of the balance due upon the decrees, the net rents and profits of the premises received by Paige for the defendants, after deducting therefrom all legal and just charges and allowances.

The fact that the stipulation and bond provided that the amount of such net rents and profits should be liquidated by a reference to a master in chancery, and that Paige offered to have the same ascertained in that manner, prior to the commencement of this suit, did not deprive La Farge of the right to have the amount of such net rents and profits ascertained and so applied in this suit. The right to have the same so applied was secured to him by the stipulation and bond and by Paige's acceptance of them and his acting upon the former; and Paige could have proceeded with the reference on giving notice thereof to La Farge, and his neglect so to do balanced the neglect of La Farge respecting the reference. It seems that a clause in a contract, providing that in case any dispute should arise in regard to the same should be settled by arbitrators, is no bar to an action upon the contract. (*Haggart* v. *Morgan*, 1 Seld., 422.) This principle is applicable to this case, and shows that the provision in the stipulation and bond for a reference to a master in chancery, to ascertain the net amount of the rents and profits of the premises, is no obstacle to the allowance of the same to La Farge in this suit.

The referee erred in allowing the defendants to retain $500 out of the net amount of the rents and profits, as a reasonable counsel fee, to the defendants. That was not a legal or just charge, or a legal or just allowance as against La Farge. Paige had already been allowed his actual expenses out in leasing and taking care of and looking after the premises, besides fees for particular services and a commis-

sion of five per cent out of the rents received; and he could not charge a counsel fee, as trustee, in addition thereto, simply because he was a lawyer. Chancellor KENT held, in *Green* v. *Winter* (1 Johns. Ch., 26), that where a trustee, who was a counselor-at-law, was to be allowed for "all his advances and responsibilities," though he was entitled to a liberal indemnity for his expenses and responsibilities incurred in the due and faithful execution of his trust, yet he was not entitled to a counsel fee as a general retainer, nor for anything more than what is understood, in the language of a court of equity, to be "just allowances." He rejected, in that case, a charge of $500 for "a counsel fee as a general retainer." The principle established in that case is applicable to this; and the charge of $500, as a reasonable counsel fee for the services of Paige, in leasing and taking care of and looking after the mortgaged premises, should have been disallowed.

On what principle Paige was allowed $165.57 commissions for receiving the net proceeds of the sale of the mortgaged premises, from the master in chancery who made the sale, and paying the same over to his co-defendants, is more than I have been able to discover. According to the bond Paige took from La Farge, as well as upon principle, the entire net proceeds of the sale of the premises were to be deducted from the sum due upon the decrees in ascertaining the amount of the deficiency. It seems to me to be very clear that this charge of $165.57 should have been rejected, on the ground that it was not a legal or just charge, or a legal or just allowance.

I am of the opinion that for the error of the referee in allowing the defendants the two charges of $165.57 and $500, the judgment of the Supreme Court should be modified or reversed, and a new trial granted, without costs to either party in this court or at the General Term of the Supreme Court.

All the judges concurring,

Judgment reversed.

JAMES C. PATTRIDGE *et al.*, Respondents, *v.* DANIEL GILDERMEISTER, Appellant.

Where the plaintiff entered into a contract with the defendant to deliver him a quantity of chairs, a part of which he then had, and a part of which were to be manufactured, and to take in payment therefor the notes of M. at six months, and delivered the chairs he had on hand; and subsequently demanded of the defendant the notes of M. for the chairs delivered, which were refused — in an action to recover for the chairs delivered, *held*, That the plaintiff might recover.

That in order to put the plaintiff in the wrong respecting the chairs to be manufactured and delivered, the defendant should have tendered the notes of M. and demanded the chairs.

That the plaintiff agreed to deliver the chairs only upon the credit of M., and was entitled to the notes on the delivery of the chairs or any part thereof.

That the refusal of the defendant to deliver to the plaintiff, the notes of M. for the chairs delivered when demanded, exonerated the plaintiff from any further delivery of the chairs, and entitled him to his action for those already delivered.

THIS action was brought to recover the price of a quantity of chairs alleged to be sold by the plaintiffs to the defendant in the summer of 1857, and which were to be paid for in the paper of J. A. Mochado & Co.

The complaint sets out the agreement to purchase, and pay in the notes of Mochado & Co., having not more than six months to run before maturity, and that plaintiffs, pursuant to said agreement, delivered to the defendant chairs to the amount of $946, and demanded the notes of Mochado & Co., which defendant refused to deliver. Whereupon judgment was demanded for $946.

The answer denies all the allegations in the complaint, and sets up by way of defense that defendant, as the agent of one Colquitt, entered into an agreement with plaintiffs to purchase a quantity of chairs amounting to $2,310, to be delivered on board the ship Ellen Hood, then lying in the port of New York, and to sail for Valparaiso in June, 1857, and to pay for said chairs, when the whole quantity was delivered, in the notes of Mochado & Co., having not more than six months to run before maturity. That plaintiffs delivered on board

said vessel, a part only of the whole quantity of chairs, alleging that they could not get the whole quantity ready, and requesting further time to deliver the residue, and it was agreed that the residue of the chairs should be delivered on board the ship Western, to sail for Valparaiso about the 1st August, 1857. That plaintiffs neglected and refused to deliver the balance of said chairs, and never have delivered the same. The defendant also averred that Colquitt was ready and willing to deliver the notes of Mochado & Co., on full performance of the agreement by the plaintiffs. And that plaintiffs were fully informed of defendant's agency for Colquitt.

On the trial, John Pattridge was examined as a witness, and testified in substance that he was one of the plaintiffs, and that on the 9th June, 1857, he sold to defendant a bill of chairs, exhibited by him, amounting to $946. Defendant wanted to pay in paper of Mochado & Co. The next day the witness informed defendant that he had but about half the quantity he (defendant) wanted, on hand, and would deliver it for the paper. Defendant assented and gave the shipping directions, and witness shipped accordingly. He says he did not agree to deliver any more. Defendant said he would have another ship ready in two months, and the witness told him he would be ready then, but the chairs were not, at the time of the conversation, manufactured. In four or five weeks, witness called on defendant and asked him for the notes, and he said that he (witness) must go to Colquitt and get pay as he had purchased for him (C.) Witness told him he knew nothing about C., he had sold the goods to him (defendant), and would look to him for pay. No other reason was given for not delivering the notes.

On cross-examination, the witness testified that their original memorandum was for chairs to the amount of $1,930, that he did not agree, absolutely, to deliver $2,300, of chairs; the agreement was, to deliver what he had ready for Mochado & Co's notes. Delivery of goods to the amount of $936 was admitted.

Other witnesses were called on the part of the plaintiff, whose evidence tended to corroborate the statements of the witness Pattridge.

On the part of the defense, several witnesses were called, whose evidence tended to prove that defendant acted in the purchase as agent for Colquitt, that the agency was communicated to the plaintiffs, that the purchase was of chairs to the amount of $2,300, which were to be paid for in notes of Mochado &. Co., on delivery of the whole quantity of chairs purchased. That, by mutual agreement, part only were delivered on the ship Ellen Hood, and the rest were to be delivered on the Western, which was to sail the 1st of August, then next, and that some were delivered on board of said ship, or elsewhere, except those delivered on board the Ellen Hood. The defendant testified, that when he was called on for the notes, he told Pattridge, that Colquitt was sick, and that he (Colquitt) would not deliver the notes, as plaintiffs had not fulfilled their contract.

The evidence being closed, the court charged the jury, that if they believed defendant was in fact the purchaser of the goods, to the amount of $2,310, then he was liable for the amount in suit, unless the non-delivery of the balance of the goods by the plaintiffs excuses him. And whether or not they were excused depended on two questions.

1. Whether all the chairs to the amount of $2,300, were to be delivered before the notes were to be delivered. If not, then there is no good ground of objection.

2. If they were so to be delivered then the exemption of defendant from liability will depend on what answer defendant made when applied to for the notes. He (defendant) did not make the non-delivery of the residue the excuse, but claimed that Colquitt was the purchaser.

If the goods were purchased on the credit of the defendant he is liable, because if the contract was an entire one, he did not object to its being completely fulfilled as a reason for not giving the notes. If delivered on Colquitt's credit, defendant was entitled to a verdict.

The defendant's counsel then requested the court to charge that if the jury believed that if the contract between plaintiffs and either defendant or Colquitt was to furnish $2,300 worth of chairs, plaintiffs cannot recover for the amount actually furnished, unless the contract has been waived by the consent of the parties, or the other party to the contract has released the plaintiffs. That the denial of the contract by the defendant when applied to for the notes, if found by the jury, is not a waiver of performance on the part of the plaintiffs.

That if the jury find that the insolvency of Mochado & Co. occurred after the delivery of the goods in suit, the fact that they had become insolvent was not a sufficient ground for plaintiffs to rescind the contract.

The court refused to charge either proposition as requested, and defendant's counsel excepted.

The jury rendered a verdict for plaintiffs for $1,046.83, and judgment was rendered thereon, and the same was affirmed at a General Term of the Supreme Court of the city of New York, and from that judgment the defendant appeals to this court.

James Emott, for the appellant.

J. T. Hoffman, for the respondent.

DENIO, Ch. J. The only real question in the case was whether the purchase of the chairs was made by the defendant, or by Colquitt through the defendant as his agent. This question was fairly left to the jury, and their finding is that the purchase was by the defendant and not by Colquitt.

The other branch of the defense was that the sale of the chairs was part of an entire contract for a larger quantity, and that the plaintiffs had failed fully to perform on their part, and could not therefore recover for their partial performance. I do not think their claim was sustained by any view of the evidence. Upon the defendant's testimony the chairs which were not delivered on board the Ellen Hood, were to be subsequently manufactured and delivered; they were contracted to

be shipped by the defendant by the Martaro, a vessel he afterward sent to South America. In order to put the plaintiffs in the wrong, respecting the chairs to be manufactured, the defendant should have shown that he called on them and offered to deliver the notes of Mochado which the plaintiffs had agreed to receive. This was not done, and it does not even appear that the vessel in which they were to be sent ever sailed or was ever ready to sail. The plaintiffs did not agree to deliver the goods on the credit of any one but Mochado. They were not bound to part with the chairs without at the same time receiving the notes, and they were never offered such notes or required to deliver any more chairs. They have therefore committed no breach of the agreement on their part, which should deprive them of payment for the chairs delivered.

If we should consider the contract for the chairs manufactured and delivered, and for those to be afterward made and delivered as parts of the entire contract, still the plaintiffs were not to wait for the payment for those delivered until the others should be manufactured. They were to take the notes of Mochado having six months to run, but they were to have the notes when they delivered the chairs. They seem not to have immediately exacted the notes for the chairs delivered, but they demanded them sometime afterward, but instead of delivering them, the defendant, the purchaser, repudiated the contract and refused to deliver them. This was a breach of the contract on his part, which relieved the plaintiffs from the obligation to deliver any more property, and enabled them to sue immediately for that which they had delivered.

The foregoing is the result of the evidence according to the testimony on the part of the defendant, and it is apparent from it that there was nothing to submit to the jury, except the question, whether the defendant or Colquitt was the contracting party. The judge should have instructed the jury that if they found against the defendant on that issue of fact they should give their verdict for the plaintiff. By leaving further questions to the jury, he give the defendant a

chance for a verdict to which he was not entitled. Of this he could not of course complain.

The charge actually given was not excepted to. The further positions which he desired to have charged, were either covered by the charge, or were in themselves incorrect, or were immaterial. He desired to have the jury instructed that the plaintiffs could not recover unless the parties were agreed to waive the further delivery, as the defendant had released the plaintiffs from further performance. This leaves out of view the rescission of the contract by the defendant refusing to perform on his part, which was conceded by the defendant's evidence, and was the only waiver or release indicated by any part of the evidence. The judge had correctly explained the effect of such refusal to perform in the charge already given.

He then desired to have the jury told that the defendant's denial of the contract when he was called upon for the notes of Mochado, for the chairs already delivered, was not a waiver of the further performance by the plaintiff. The judge had already instructed them correctly on that point when he told them that the claim of the defendant, that Colquitt was the purchaser and his consequent refusal to give the notes dispensed with a further performance on the part of the plaintiffs.

The last proposition was irrelevant. The plaintiffs had claimed notes on the ground of Mochado's insolvency. That fact certainly would not relieve the defendant from receiving their notes according to his agreement. He did refuse, and thus broke his agreement, and became bound to compensate the plaintiffs for the goods which had been delivered.

I think the appeal was wholly without merit, and that the judgment appealed from should be affirmed with damages for the delay.

All concur except MULLIN, J., who dissents.

MULLIN, J. (dissenting.) The only questions before us for examination on this appeal, are those arising on the refusal of the court to charge as requested by the defendant's counsel.

There were no exceptions taken to the rulings on the trial, nor to the charge given to the jury. The refusal of the court being to vary the charge as given, makes it necessary not only to inquire whether the refusals to charge as requested were erroneous, but also whether the charge, as given, embraced the propositions to which the requests applied.

The first request to charge was that if the jury believe from the evidence that the contract was to furnish $2,310 worth of chairs the plaintiffs could not recover for the amount actually furnished unless the contract had been waived by the consent of the parties, or the other party to it had released the plaintiffs.

The first branch of this request is only another mode of stating an elementary legal proposition, that in order to entitle the vendor of personal property to recover in an action for the price, he must prove performance on his own part. Full performance is in such cases a condition precedent to his right to recover. The rigor with which this rule is applied is very well illustrated in the case of *Oakley* v. *Morton* (1 Kern., 25). In that case, Oakley agreed with Morton to keep twenty cows during the dairying season and sell the butter made to Morton at a price agreed upon, to be delivered at a time and place specified. Oakley, at the commencement of the season put twenty cows on his farm and made butter therefrom until the end of the season, except that about the first of September three of the cows, and two about the middle of October, ceasing to yield more than about a quart of milk each per day, and to be of no value for dairying purposes, were respectively sold at those dates. The butter made from the cows was sent by direction of the defendant to a commission merchant in New York for sale, and it was sold, but the commission merchant failed, and the action was brought to recover the contract price of the butter. The plaintiff had a verdict at the circuit. The defendant moved for a new trial on a bill of exceptions, which was denied, and judgment was rendered for the plaintiff, and there was an appeal to this court, and it was held that the plaintiff was not entitled to recover because he had not performed his con-

tract. The keeping twenty cows for the whole season was a condition precedent which the plaintiff was bound to perform, and not having performed it, he could not recover, and the judgment was reversed.

In *Baker* v. *Higgins* (21 N. Y., 397), Baker agrees to deliver to the defendant 25,000 pale brick on the dock at East Troy, at $3 per thousand, and 50,000 hard brick at the same place at $4 per thousand. He actually delivered 10,500 of each, and the defendant refusing to pay until the whole were delivered; the action was brought for the price of the quantity delivered. It was held that he could not recover; that delivery or readiness and an offer to deliver the entire quantity was a condition precedent to payment. The defendant was unquestionably entitled to the instruction, and unless the court had given to the jury substantially the same instruction, the refusal was erroneous and the judgment must be reversed. The charge was that if defendant was the purchaser of goods to the amount of $2,310 he was liable for the amount for which the action was brought unless the non-delivery of the balance of the goods by the plaintiffs excuses him; and whether he was excused depended on two questions: First, whether all the chairs were to be delivered before payment, if not, then the defendant was liable, and second, if the whole were to be delivered before payment, then the plaintiff was relieved from the delivery of the whole, provided defendant put his refusal to pay on the ground that he was not the purchaser and not upon the non-delivery of the whole quantity of chairs.

It will be perceived that the charge presents to the jury the same proposition contained in the request, accompanied with sundry modifications not in terms contained in the request. But the request after stating that plaintiff could not recover without delivery of the whole of the chairs, was in the following words, "*unless the contract has been waived by the consent of the parties or the plaintiff was relieved by the other party.*" This is only another mode of expressing the same proposition stated in the charge, because by the charge the court instructed the jury that if the defendant put his refusal

to pay, on the ground that he did not purchase the chairs, and did not on the omission to deliver, it was an excuse for the non-delivery, or in other words, it operated as a waiver of the condition precedent.

It seems to me, therefore, that the court was right in refusing to charge in accordance with the first request, having previously charged substantially as requested..

The second request must, however, be taken in connection with the first, as it is necessary to give point and effect to the first request. The second request is in these words: "The denial of the contract by the defendant when applied to for the notes is not a waiver of performance on the part of the plaintiff." The charge was, defendant was liable if he did not put his refusal to deliver the notes on the ground of non-delivery of the whole quantity of chairs by the plaintiff. The effect of the refusal to deliver because defendant was not the purchaser is not put to the jury in the charge, and if this construction could have had any influence on the verdict it was error in the court to refuse to give the instruction.

In one part of this charge the jury are told that the defendant's liability depended on the answer he gave when called on for the notes. The judge does not state to them what the answer was, but instructs them that an answer which he did not give rendered him liable. I am unable to conjecture what effect the charge, if given as requested, would have had on the jury, but I can perceive no reason why defendant should not have had the benefit of an instruction as to the effect of what he did say. The position of the judge was: I will not instruct the jury as to the legal effect of the answer given by the defendant to the plaintiffs' request, but I will instruct them that an answer which he might have given, but did not give, was fatal to him.

If it be said that the effect of the charge and refusal was to inform the jury that what was said by the defendant at the time of the demand of notes was immaterial, so long as he did not place his refusal on the grounds of non-delivery of the whole quantity of the chairs, the answer to the suggestion is that no such instruction was given, and if it had been

given, I think it would have been erroneous. The two requests taken together were entirely sound and should have been given to the jury. It is unquestionably true that plaintiff was bound to deliver the whole of the chairs unless the conditions were waived or the plaintiff relieved, and the answer given could not operate as a waiver of performance.

The plaintiff had given evidence of the insolvency of Mochado & Co. To hold the plaintiff to complete performance before he could recover, was, in effect, compelling him to take in payment the notes of an insolvent firm, a result a jury would struggle to avoid unless compelled to come to it by positive instructions from the bench or by the overwhelming force of the evidence. It was due to the defendant under such circumstances, that he should have the benefit of any construction which could be legitimately given in order to relieve him from the improper influence of the evidence of insolvency. The instruction asked for as to the legal effect of the insolvency of Mochado & Co., was not irrelevant, and should have been given. There is reason to apprehend that the refusal to give the instruction might be treated as equivalent to saying that the insolvency of Mochado & Co. was a sufficient ground for plaintiffs to rescind the contract, and if so understood, was fatal to the defendant.

While the court should not be astute in searching for grounds on which to reverse a judgment or set aside a verdict, yet every one conversant with legal proceedings knows to what extent juries endeavor to relieve a party from the effect of a rule of law, when it contravenes in the given case, their views of what is right and just, and when there is reason to fear that a jury has been thus influenced, it is the duty of the court to protect the party by holding both court and jurors to a rigid compliance with the rules of law.

It is quite possible that a new trial may not change the result already arrived at in this case. We cannot be influenced by any such consideration. The defendant had the right to these instructions, requested, and it was the duty of the court to comply with them. And having refused to do

so the judgment should be reversed and a new trial ordered, costs to abide the event.

The omission to except to the charge has deprived the plaintiff of the benefit of a review of that portion of it in which the jury was instructed that defendant was liable, because he did not put his refusal to deliver the notes on the ground that the plaintiffs had delivered all the chairs. I am not prepared to admit the soundness of the proposition, but as it is not in the case, it is unnecessary to discuss.

Judgment should be reversed and a new trial ordered, costs to abide the event.

Affirmed.

JOHN VAN VECHTEN, Respondent, *v.* JOHN GRIFFITHS *et al.*, Appellants.

Proceedings *in rem* against a vessel for the price of coal furnished her determine no question of ownership of the vessel; and, consequently, are not admissible as evidence for the purpose of proving ownership.

Counsel desiring the court to instruct the jury as to a particular proposition, not making the proposition clear and intelligible, cannot complain if the instruction is refused.

THIS is an action brought to recover damages for the alleged conversion of a quantity of coal, the property of the plaintiff. Griffiths was the sheriff of Ulster county. The defendant, Lefever, was a judgment creditor of one N. Elmendorf, and the defendant Schoonmaker was a co-defendant in another judgment with said Elmendorf, recovered in favor of one Styles. It was under these two judgments, that the coal in question was levied on, as the property of Elmendorf, by Griffith, the sheriff, under the directions of the other defendants.

Upon the trial, the plaintiff called one Morey as a witness, to testify as to the ownership of the coal, who testified that in 1855, he was running the steamboat Alida from Rondout to New York, under the plaintiff Van Vechten. That he was acting as agent of the plaintiff and for him, *and bought the coal for the plaintiff.* Before July, 1854, he had acted as agent of Elmendorf in running the boat Alida, Elmendorf having been former owner. The boat was sold in July, 1854, when the plaintiff bought it, and hired the witness to go on as his agent, the same as before. The sheriff was ordered to sell the coal in question by Lefever & Westbrook, Westbrook acting for Schoonmaker. It came out on the trial, under an objection from the defendants, that the Styles judgment (the amount of it) was paid to Styles, by the check of the defendant, Schoonmaker, but that it was not his money that paid it, but the money of Cornelia Schoonmaker, who paid the amount and took an assignment of the judgment.

After this testimony had been given, the defendants offered to show by same witness an agreement between him and Elmendorf, by which the latter had agreed for a valuable consideration to assume the payment of the debt upon which this judgment was recovered, and indemnify Schoonmaker from all liability upon it. Under objection, the offer was rejected, and the defendant excepted. Sykes, Van Wagoner and Morey, testified that this coal was never delivered on board the Alida under the contract received in evidence, but upon the pledge for the payment thereof, made by Morey, Robert Van Wagoner and Josiah Dubois, Van Wagoner averring that what was called the *contract*, they had refused to carry out. The defendants offered in evidence an exemplified copy of the proceedings in the United States District Court, against the steamboat Alida, upon the libel of the Delaware and Hudson Canal Company, to obtain judgment for the coal in question, and the decree of the court in the case—which offer, under the objection of the plaintiff, was rejected. It appearing that Elmendorf had negotiated to raise some money for the plaintiff, and had obtained from a firm in New York (Mills & Thompson) three notes, for which they were secured by a mortgage on the Alida, the defendant offered to show that upon a trial in New York, in an action brought to foreclose the mortgage, it had been held usurious and was not paid, which evidence, under plaintiff's objection, was rejected.

The court, among other things, charged the jury that "if Morey is to be credited there can be but little doubt, that he both run the boat and purchased the coal as the agent of the plaintiff, and for the plaintiff." Exception by defendant. Several other exceptions were taken by the defendant to the judge's charge, and to the judge's refusal to charge, which will be noticed in the opinion of the court. The jury found a verdict for plaintiff for $582 damages, and the court ordered the case and exception to be heard at a General Term in first instance, all proceedings on the verdict to be in the mean time stayed. The General Term heard the case, and ordered judgment for the plaintiff to be entered on the

verdict. Judgment in pursuance of order of General Term, was, January 10, 1860, duly entered in Ulster county clerk's office, for $850.02, damages and costs. From the above judgment so entered, the defendants appealed to this court.

L. Tremain, for the plaintiff (respondent).

John H. Reynolds, for the defendants (appellants).

HOGEBOOM, J. Most of the propositions in the judge's charge to the jury on which the appellants' counsel founds his allegations of error are manifestly comments upon the facts of the case, or expressions of opinion in regard thereto, and are not the subject of exception, and the remedy is not to except thereto, but to call the attention of the judge to them, and ask for fuller explanations in regard thereto, or demand their submission to the jury as questions of fact.

Of this nature is the remark that there was no evidence of any collusion between the plaintiff and Elmendorf in regard to the purchase of the Alida; also, the remark that the $9,000 and the proceeds of the stock of the State of New York Bank and Huguenot Bank, were all the moneys shown to have belonged to Elmendorf, or to have been advanced by him to the plaintiff; and also the remark that if Morey was to be credited, there could be but little doubt that he both run the boat and purchased the coal as the agent of the plaintiff.

The only points in regard to which I have had any hesitation was the refusal to comply with the defendants' request to charge in a single particular, and the rejection of a single offer of evidence. The defendants requested the court to charge that although Morey supposed he was acting as the agent of Van Vechten, yet if Elmendorf was the man standing back, and Van Vechten was his agent, then Morey's supposition as to the party for whom he was acting made no difference. The court refused to charge in this form, and the defendants' counsel excepted. I think on the whole such refusal was proper, for the following reasons:

1st. It was not in itself quite clear and intelligible. It probably was intended to say that if Elmendorf was the real

principal of Van Vechten, who was the apparent principal of Morey, Morey's ignorance of that fact, and supposition that Van Vechten was the real and ultimate principal, would not prejudice the defendants' right to go back to the real, though remote principal in the transaction. But the idea was not very clearly conveyed by the language used.

2d. The court had already charged that if Morey was acting as agent for Elmendorf, they must find for the defendants. This embraced the substance of the instruction asked — not in the precise words proposed — but in legal effect. And it is not to be supposed that the counsel had neglected to present the application of this principle in all its various phases to the jury, or that the court would have refused a more detailed exposition of it to the jury if it had been properly and intelligibly requested.

The defendants' counsel also offered to prove that the debt in the Styles judgment was in fact, by an agreement for a valuable consideration, entered into between Elmendorf and Schoonmaker, the debt of Elmendorf to pay, and had been assumed by the latter. This evidence was twice offered and twice rejected by the court, and the defendants excepted. I adhere to the opinion I entertained when the case was in the Supreme Court, that this was error. Schoonmaker justified under the Styles judgment, and as he was a defendant therein, and had moreover, by his own check, paid the same when it was assigned to his mother, Cornelia Schoonmaker, it became necessary, in order to show that the judgment was still in life and not extinguished, to prove either that the assignment was a *bona fide* one to the latter, paid for with her money, or taken in her name, though for the benefit of Marius Schoonmaker, in order to enable him to collect its amount of the party (Elmendorf) really and primarily liable to pay. Having this object, the testimony was, in my opinion, proper, and should have been admitted. But a suggestion is now made which was not presented in the Supreme Court, that although this may have been technically erroneous it worked no practical prejudice in the final result to Schoonmaker, as the defendants justified under another judgment—that of Lefever

—wholly unimpeached, and inasmuch as the jury rendered a general verdict in favor of the plaintiff against all the defendants including Lefever, it must have been founded upon the fact ascertained by the jury and declared by their verdict that the coal which was the subject of the controversy was the property of Van Vechten, and not of Elmendorf, at the time of the levy and sale under the judgments and executions. On reflection I regard this as a satisfactory answer to the argument based on the rejected evidence. I am not able to see that Schoonmaker has been prejudiced by its erroneous exclusion, and I therefore assent to the *affirmance* of the judgment of the court below.

DAVIES, J. This is an action of trespass against the defendants, for taking and converting to their own use a quantity of coal, which the plaintiff claimed as his property. The defendants claimed that the coal was the property of one Nicholas Elmendorf, and they justified the taking of the coal by virtue of a sheriff's sale to them on executions issued on judgments against Elmendorf. The main point in controversy upon the trial was whether, at the time of the sheriff's sale, the coal was the property of the plaintiff or that of Elmendorf. The verdict of the jury affirms that it was the property of the plaintiff, and if there has been no error in the admission or rejection of evidence, or in the charge made or refusal to charge, that verdict must stand, and the fact affirmed by it be regarded as established. On the 17th July, 1854, John Van Vechten claimed to have become the owner of the steamboat Alida, by virtue of a sheriff's sale to him upon executions issued upon judgments against Nicholas Elmendorf and others. Elmendorf had theretofore been the acknowledged owner of the boat. While such owner, and in the spring of 1854, he had made a contract with the Delaware and Hudson Canal Company to supply the boat with coal. After the purchase of the boat by the plaintiff he employed one Morey to run the boat for him and on his account; and Morey testified that he purchased this coal of the Delaware and Hudson Canal Company for the plaintiff.

That he was authorized to purchase for the plaintiff, and on his account, what the boat needed. The defendants claimed that the sale of the steamboat to the plaintiff was collusive. That in fact Elmendorf was the purchaser, and that he furnished the money paid for her, and was in truth the bidder at the sheriff's sale. Evidence was given tending to show that Elmendorf advanced money to Van Vechten, at about the time of the sale; that Van Vechten was his father-in-law, and that Elmendorf, after the sale, interfered in the affairs of the boat. Upon the trial, the plaintiff sought to establish that one of the judgments upon which the sheriff sold had been paid and extinguished at the time of the sale. This was a judgment in favor of William H. Styles against Elmendorf, Marius Schoonmaker and William Masten, and which Schoonmaker procured to be assigned to Cornelia E. Schoonmaker, his mother. He testified that the assignment was for his benefit, as he did not want his property sold under the judgment; that it was not his money that was paid for the assignment, but that of his mother; and the defendants offered to show that before the judgment was rendered, by an arrangement between Elmendorf and Schoonmaker, Elmendorf had assumed to pay and save Schoonmaker harmless from this very debt. This evidence was objected to by the plaintiff as irrelevant and improper, and excluded by the judge, and an exception taken. The counsel for the defendants also offered in evidence an exemplified copy of the records of the proceedings of the United States District Court of the Southern District of New York, upon the trial of the Delaware and Hudson Canal Company against the steamboat Alida for the condemnation and sale of the vessel, her tackle, etc., to pay the amount due the libellant for the coal in controversy, with interest and cost, and the judgment and decree of the court thereon, which was objected to by the counsel for the plaintiff, and the same was excluded by the judge, and an exception taken. In charging the jury the judge, among other things, said, "If Morey is to be credited there can be but little doubt that he both run the boat and purchased the coal as the agent of the plaintiff and for the

plaintiff." This portion of the charge was excepted to by the counsel for the defendants. He also stated to the jury that there was no evidence of any collusion between the plaintiff and Elmendorf in regard to the purchase of the steamboat; and he also stated to the jury, that the $9,000 and the proceeds of the State of New York bank stock and the Huguenot Bank stock were all the moneys shown to have been Elmendorf's, or advanced by him to the plaintiff, or in regard to which there is any proof that it was Elmendorf's; and that the proof of these facts was not at all important, except as bearing on the question of ownership, and that the Alida was run for Elmendorf and not for Van Vechten; to which several portions of the charge the defendants' counsel also excepted. The judge further charged the jury that, if the jury were satisfied that Morey was acting as agent for Elmendorf [though he swears otherwise] then they must find for the defendants. To the remark in brackets, "though he swears otherwise," the defendants' counsel excepted. The counsel for the defendants requested the judge to charge the jury: "That, although Morey supposed he was acting as the agent of Van Vechten, yet if Elmendorf was the man standing back, and Van Vechten was his agent, then Morey's supposition, as to the party for whom he was acting, made no difference." The judge refused so to charge, and the defendants' counsel excepted.

The inquiry as to the arrangement between Schoonmaker and Elmendorf, was wholly immaterial upon the issue submitted to the jury, and passed upon by them, namely, whether or not Van Vechten was the owner of the coal levied upon and sold by the defendants as the property of Elmendorf. They only needed the judgments and executions against Elmendorf as a protection and justification in seizing and taking his property. The judgment could not in any sense be said to justify the taking of the plaintiff's property. Until that issue (the only one submitted to the jury) had been found adversely to the plaintiff, did the inquiry become at all material, in reference to this or any other judgment against Elmendorf. If the coal was the property of the

plaintiff, the defendants then make it trespassing, and it is immaterial whether they took it under cover of judgment and execution, and sales therein, or how otherwise, and it is equally immaterial whether such judgments were pretended or real, paid or valid. In any event they could furnish no justification or excuse for taking and selling the plaintiff's property. It was of no importance, therefore, whether the agreement inquired about existed or not. It could only have been material in the event that the jury had found that the coal was the property of Elmendorf, and the defendants were seeking to justify themselves for taking and converting his property. No question was made as to the Lefever judgment. That was a valid and subsisting judgment, and if the coal was the property of Elmendorf, the levy under the execution issued upon it, and the sales by virtue thereof, divested Elmendorf of all rights and title in the coal, and vested the same in the defendants, the purchasers at the sale. This made their title and justification upon this hypothesis complete, and they had no occasion to strengthen it by invoking the aid of the other judgment. It was assumed by the charge that the defendants had good title to the coal, and were justified in taking it, provided it was not the property of this plaintiff, and the issue was narrowed down between the parties to that simple question. The defendants could have sustained no injury by the exclusion of the offered evidence. Each of the defendants in his answer claims that the coal, at the time of the sale, was the property of Elmendorf, and in his possession, and the defendant Schoonmaker admits that he was one of the purchasers thereof at said sale, and claims title thereto by virtue of said sale. He could not, therefore, fail in his defense, even if the Styles judgment had no existence, provided the defendants had established on the trial that the coal was the property of Elmendorf. To this end the defendants offered in evidence the proceedings in the district court of the United States, whereby it appeared that the steamer Alida had been libeled, by the vendors of this coal, to recover the amount thereof, and that the vessel had been condemned for the coal,

with costs, etc. This was a proceeding *in rem* against the vessel, which was liable for the coal furnished her, whoever might have been the owner of the vessel or the owner of the coal. The proceedings determined no question as to such ownership, and could have no relevancy in arriving at a solution of that question. If the statement of Morey be true, that he purchased the coal for the plaintiff, and upon his credit, then the plaintiff became the owner of it, and he was also liable to the vendors for the price thereof, as well as the vessel for which it was provided. The plaintiff was the owner of the boat, unless there was collusion between him and Elmendorf. The defendants did not ask that question to be submitted to the jury, and if it had been, and they had found that the sale of the boat to the plaintiff was collusive, and that, in fact, it still remained the property of Elmendorf, there was no evidence given upon the trial to sustain such a finding. If the boat was the property of the plaintiff, then the condemnation and sale thereof to pay for the coal, would only show that he had paid for the coal, as he had agreed to do, when he purchased it. That he had but discharged a debt due by him, and this tended in no degree to establish the position that the coal was the property of Elmendorf. The evidence was properly excluded.

I am unable to see anything objectionable in the first portion of the charge, objected to by the defendants' counsel. In it, the judge states, that if Morey is to be believed, there is little doubt, that both run the boat, and acted as the agent of the plaintiff, in the purchase of the coal. Morey's testimony was not sought to be impeached directly, but circumstances were adduced by the defendants, by which they sought to maintain that Morey, in running the boat, and making the purchase of the coal, acted as the agent of Elmendorf. His positive statement under oath, was that in making the purchase, and running the boat, he acted as plaintiff's agent. It was the duty of the judge thereupon, to have called the attention of the jury to this positive statement of the witness, to rebut the defendants' theory, and if his testimony was credited, it effectually demolished it. It was no error on the part of

the judge, to say so to the jury. The judge was undoubtedly correct in stating to the jury, that the proof of the facts, in regard to the collusion alleged between the plaintiff and Elmendorf, in relation to the purchase of the boat, or in regard to the moneys advanced by Elmendorf to the plaintiff, and that the Alida was run for Elmendorf, and not the plaintiff, were only important as bearing on the question of ownership — that is, the question of the ownership of the coal. That was the only question at issue, and the circumstances alluded to had no significance, except as bearing upon that question. If the defendants wished any question submitted to the jury, on the subject of the collusion or of the moneys advanced by Elmendorf, or as to Morey being his agent, the judge should have been specially requested to submit such questions, and if he had refused, an exception could have been taken. If such refusal had been error, the exception would have been available. (*Fraser* v. *Stellwagen*, 15 N. Y., 315; *Plumb* v. *Cattaraugus County Ins. Co.*, 18 N. Y., 392; *Winchell* v. *Hicks*, id., 558.) There was no error in the judge stating to the jury in his directions to them to find a verdict for defendants, if they found that Morey was acting as the agent of Elmendorf in the purchase of the coal, that Morey had sworn otherwise. It was not withdrawing from them the decision of the question, whose agent he was, but calling their attention to the fact, when they were weighing all the circumstances bearing on that point, to the testimony of Morey himself. It was positive and unequivocal, and his testimony was not sought to be impeached. It was a controlling fact in the cause, and it was the right of the plaintiff, to have it placed properly before the jury. The jury were not told to give it any undue weight, but to take into consideration, when discussing this point, what Morey had sworn to. It is difficult to see how the judge could have more impartially or candidly referred to the conflicting testimony in the case. He properly left all the facts and circumstances to the jury, for them to draw such inference, as they, in their judgment, should determine. The Supreme Court, saw no reasons for disturbing their verdict on the main question, controverted on the trial, and it is not

the province of this court, finding no error to have been committed on the trial, to review or interfere with the verdict of the jury upon the facts.

The judgment should be affirmed.

All concur.

Affirmed.

HENRY H. BABCOCK and others v. FRANCIS A. UTTER and others.

A parol license given without consideration, to a party to build a dam upon the land of the licenser and across that portion of a stream included within his boundaries, is not an equitable estoppel operating by way of impediment upon the licenser and those deriving title from him.

Equity never aids in subversion of legal rights; but on the contrary, it always assists in their security and preservation, by appropriate remedies, and in furtherance of justice.

A mere verbal license to do an act, or a series of acts, upon the land of the licenser, necessarily excludes the idea of a contract right which equity might enforce.

The doctrine of the case of *Rench* v. *Kerr* (14 S. & R., 207), not law in this state.

JOHNSON, J. It is agreed, on all hands, that the right in question in this case is an interest in real estate, which in law cannot be created or transferred from one party to another without some instrument in writing. Whether it can be done by a court of equity, against the positive provisions of the statute, is the question to be determined.

It is also agreed that the right claimed by the plaintiffs, as against the defendants, on the north or west side of the river was derived solely from a mere parol license, given by Henry Clark in 1821, without consideration, to William Utter, to build and abut a dam upon the lands of the former and across that portion of the stream included within his boundaries. The dam was built under this parol license, and has been ever since maintained for the purpose of supplying with water-power the mills and machinery erected by said Utter and his assigns according to the original intention and design of both the licenser and licensee, until the commission of the acts complained of in this action.

The plaintiffs' position is, that although no property or interest ever actually passed by the license from the licenser to the licensee, yet by the execution of the license by the licensee the rights of the licenser became so fixed and bound that neither he nor his heirs or assigns can now revoke such license, and thus deprive the licensee or his assigns of the advantages and privileges accruing by means of the license

thus executed. This position, if sound, must have its foundation in the principle of equitable estoppel, operating by way of *impediment* upon the licenser and those deriving title from him. There is no other principle in our law, as I conceive, which can lend any countenance to such a proposition. Does the doctrine of equitable estoppel apply to a case like this? I am constrained to say, after a careful examination of the facts and the authorities, that, in my opinion, it does not, and that the preponderance of authority in this country is most decidedly the other way. I shall not attempt to go over the cases, but content myself with observing that the principal authority in this country for the application of the doctrine to the case of a mere verbal license is that of *Rench* v. *Kerr* (14 Serg. & Rawle, 207), which DUER, J., in *Jamison* v. *Milliman* (3 Duer, 255), declared not to be law in this State, or in this country outside of Pennsylvania.

A mere verbal license to do an act or a series of acts upon the land of the licenser, necessarily excludes all idea of a right to do the act or acts by virtue of a contract, or promise, which equity might enforce specifically. It also excludes all idea of fraud or concealment on the part of the licenser, in respect to his title, and of ignorance or mistake as to such title on the part of the licensee. It presents the case simply of two parties acting voluntarily with their eyes open; each understanding fully and perfectly the situation of the other, and where the licensee does the act he is permitted by the license to do, and makes the expenditure necessary thereto, with perfect knowledge and consciousness on his part that he has acquired no interest in the lands of the licenser, which the law can recognize or protect, and never expecting to acquire any other interest than that conferred by the license. What is there in such a case for equity to act upon? Manifestly nothing. While equity will regard that as done which the parties agreed to do, and compel the specific performance of agreements between parties according to the original understanding and intention, and will interpose to protect an innocent party against mistakes in matters of fact, and the fraudulent acts or concealments of the other party,

it can never lend its aid to confer upon one, as against another, rights or interests which were never within the contemplation of either, even by way of impediment. It never aids in the subversion of legal rights, but always assists in their security and preservation, by appropriate remedies, and in furtherance of more perfect justice. To grant the relief here prayed for, would effectually subvert the legal right, or, which is the same thing in effect, forever prevent the exercise of those rights, which unavoidably pertain to one seized of the undisputed legal title, and with which he has never consented to part. To imply such consent, from a mere license to occupy, would be to confound a license with a contract or deed, which have no resemblance to it whatever. It was never any part of the office or jurisdiction of equity to shield or rescue men from the legitimate consequences of their own free and voluntary acts of imprudence or folly. To give by decree to one, the title or the right to the perpetual use and occupancy of the land of another, simply because he had been imprudent enough to build or expend money upon it with the mere naked consent of such other, without any stipulation whatever as to such title or right, would be as repugnant to the principles of equity as to to the rules of law. If, therefore, Ethan Clark's deed extended to the thread or center of the Unadilla river, it gave him all the right and title which Henry Clark had in his lifetime, and this action cannot be maintained, as the rights of Francis A. Utter are superior to those of the plaintiffs.

Upon this question, however, I agree with SELDEN, J., that the deed of Ethan Clark confines him to the bank of the stream, and conveys no right to the water, consequently there must be a new trial.

Judgment reversed.

JOEL TIFFANY, *State Reporter.*

THE OGDENSBURGH, CLAYTON & ROME RAILROAD COMPANY, Appellant, v. WILLIAM W. WOLLEY, Respondent.

Though the law require the subscriber to the capital stock of a railroad company to pay ten per cent in cash at the time of subscribing, to make a valid contract binding on the parties, yet if the subscriber, instead of paying the ten per cent in cash, give his note for the same, and subsequently pay it, so that the company gets the money, he is thereby constituted a legal stockholder of such company, and is liable on his subscription.

Once becoming a legal stockholder, he cannot afterward repudiate any part of the legal obligations he assumed in becoming such.

The giving of a negotiable note by which the company realizes the money and the paying of said note is, in legal effect, a cash payment.

A contract is not void as against a statute, unless founded upon an illegal consideration which enters into, and forms a part of the contract, or, unless it provides for doing something distinctly forbidden.

APPEAL from an order of the Supreme Court granting a new trial, with stipulation for final judgment. The action was brought to recover sundry installments alleged to be due upon a subscription, by the defendant, of $700, to the capital stock of the plaintiff. The defendant, in his answer, denied that he ever became a subscriber to the capital stock of said corporation, or that he ever paid the sum of $70 to the directors of said corporation or plaintiff, or that he ever paid or became liable to pay, any sum whatever, either as or for the first ten per cent, or as and for subsequent installments.

The cause was referred to the Hon. WILLIAM J. BACON, who ordered judgment for the plaintiff for $333.16.

The following are the referee's findings of fact and conclusions of law:

The plaintiff was organized as a corporation, as alleged in the complaint, that thereafter and sometime in the fall of 1853, the defendant subscribed for $1,000 of the stock of the plaintiff's, such subscription being made while the subscription book was in the hands of Alanson H. Barnes, a director of said company, duly authorized to receive the same; that nothing was paid upon said subscription at the time, but the

defendant gave his promissory note to said Barnes, for $100, as and for the ten per cent required at the time of subscribing; that subsequent to this, and in the summer of 1854, an arrangement was made by said Barnes by which the subscription of said defendant was agreed to be and was reduced to the sum of $700, and defendant's name was entered on plaintiff's books as a subscriber for $700 of stock; and in the month of July, 1854, and again in September, 1854, the defendant gave two negotiable promissory notes, in which were embraced and included the original ten per cent, and the several calls which had been made and was due upon said stock, down to, and including the call due and payable on the 1st of August, 1854, and the note of $100 was thereupon surrendered to the defendant; that the said notes, before their maturity, were negotiated to, and discounted by, the Bank of Lowville, by which bank they were held and owned at and after maturity; that subsequently suits were brought upon both of said notes in favor of said bank; that the defendant employed an attorney and put in an answer to said suits, but before the time of the trial, becoming satisfied that the bank had discounted the notes without notice and in the ordinary course of business, he abandoned the defense, and judgments were taken upon the notes, which judgments the defendant subsequently paid, and thus both notes were satisfied and paid; that calls were made by the plaintiff for payments upon said stock, as alleged in the complaint, of which defendant had due notice, and that he has neglected and refused to pay the several calls due and payable on the 1st of November, 1854, the 1st of February, 1855, the 1st of November, 1855, and the 10th of November, 1857.

On these facts the referee's conclusions of law were, that the defendant is not discharged from his subscription by the omission to pay ten per cent in cash at the time of subscribing, but that the giving of the notes, which included the ten per cent and the subsequent calls, and the payment thereof operated as a waiver of any right he might have had to repudiate his subscription, and was a ratification thereof, and an assent to be bound by it as an exising and continuing lia-

bility; and that the plaintiff is accordingly entitled to judgment for $333.16, being the amount of the four calls above mentioned, with interest from the date of each call respectively.

Judgment being entered on the report of the referee, the defendant appealed to the General Term of the Supreme Court, where the same was reversed, and a new trial granted, with costs to abide the event. From this order the plaintiff appealed, stipulating that if it be affirmed, a judgment absolute may be rendered against the company.

J. H. Reynolds, for the plaintiff.

E. A. Brown, for the defendant.

WRIGHT, J. The defendant became a subscriber to the plaintiff's capital stock; but at the time of subscribing did not pay ten per cent in money. Subsequently, by agreement, the original subscription was reduced from $1,000 to $700, and on two occasions he gave to the company two negotiable notes, in which were embraced and included the original ten per cent and the several calls which had been made, and which were due and payable upon the stock down to the 1st of August, 1854. These notes the defendant afterward paid. Before their maturity they were discounted for the railroad company by the Bank of Lowville, and subsequently suits were brought by the bank upon them, judgments taken again by default, and the judgments satisfied and paid by the defendant. Thus there was an actual payment of the original ten per cent, and three several subsequent calls or installments of ten per cent each. After forty per cent had been paid on the subscription, the defendant, in an action to recover further installments, alleges as a defense that such subscription is invalid, and he is not bound by it because of his omission to pay ten per cent in cash cotemporaneously with the act of subscribing.

If the statute not only requires a subscription on the books of the company but that such subscription should be attended by a cash payment of ten per cent to make a valid contract

and one binding on the parties, the defense must succeed. On the contrary, if a cotemporaneous cash payment was not necessary to the validity of the subscription, or was not a condition precedent to the defendant's liability attaching; or if the subsequent payment of the ten per cent, voluntarily or involuntarily, so that the company actually got the money, invested the defendant with all the rights of a stockholder in the plaintiff's corporation, and he could have compelled a delivery of the stock to him when the action was brought, there is no defense. If he ever became a stockholder he could not repudiate his obligation to pay for the stock for which he had subscribed, and if, as was doubtless the case, the object of the statute requiring a subscriber to pay ten per cent in cash on the amount subscribed, was to secure money to the plaintiff on a subscription to its stock, it was fully acomplished in the present case. The money, it is true, was not paid simultaneously with the subscription, but it was afterward realized by, and went into the treasury of the company, and I am unable to see why the subscription would not at least be valid and binding, from the time the money was realized, which was before the commencement of the suit. It could only be otherwise upon the ground that to make a valid and obligatory contract for stock between the company and the subscriber, the statute imperatively requires two things to be done, viz.: a subscription and payment by the subscriber of ten per cent of the amount subscribed by him *in cash at the time of subscribing*, and that unless the subscription and payment are simultaneous, though the ten per cent may be subsequently paid and the money realized by the company, no liability attaches to the subscriber. This position I consider untenable and it has been so regarded in at least two cases in this court. In the case of *The Black River & Utica Railroad Company* v. *Clarke* (25 N. Y., 208), the defendant made no cash payment at the time of the subscribing. He subsequently paid forty per cent on the amount of his subscription and then, as in this case, sought to defend an action to recover further installments on the ground of the invalidity of the contract, because of the omission to pay the ten

per cent in money at the time of subscribing; but the court held that after the actual payment of forty per cent on the subscription, the statute requirement on this point must be deemed fully complied with, and the defendant was bound by the contract. In *Beach, Rec'r*, v. *Smith* (a case not yet reported) the defendant paid no money at the time of subscribing. He had been acting for the company some three months before he subscribed, in July 1853, and continued in its employ afterward. On the 25th of February, 1854, he settled with the company, charging himself with the ten per cent, and also with another installment of ten per cent called for and payable on the first of February, 1854, and the company paid him the balance of his account. The court said: "It is sufficient that the ten per cent, or the first amount to be paid has been subsequently paid to render the subscription valid and binding upon the defendant. On the 25th of February, 1854, he in fact not only paid the ten per cent, but the first installment called for, of ten per cent, payable on the first day of that month. He had, therefore, on that day paid twenty per cent on the amount of his subscription, and he cannot now be permitted to allege that it was not valid because he did not at the time of subscribing pay the ten per cent in cash," The only distinction between these cases and the present is, that in the first case cited, the subsequent cash payments were made directly to the company by the defendant; in the second no money was paid, but the defendant settled with the company, voluntarily charging himself, in such settlement, with the two installments as so much money paid on his subscription, the company paying him the balance of his claim against it. In the present case the defendant did not directly pay the money, but with the intent to effectuate his subscription gave negotiable notes for three installments, and also for the original ten per cent; and these notes he afterward paid. When he gave the notes he had not reached the point of attempting to repudiate his subscription. By giving them he authorized the plaintiff to negotiate them and apply the proceeds in payments upon his subscription, and this was done, and is the same in legal effect as if he had

paid the money himself. It can make no difference whether the defendant afterward paid the notes thus given, willingly or not, so long as they were in fact paid. If there was an actual payment of the ten per cent, though the defendant may have afterward made an ineffectual effort to get rid of the payment of the notes which supplied the plaintiff with the means of actually getting the money, the subscription would not be void. Certainly the validity or invalidity of a subscription to stock under the general railroad act can not depend on the fact whether the statute has been complied with in the payment of the ten per cent willingly or unwillingly by the subscriber. A subscription cannot be valid when the money has been subsequently voluntarily paid, and invalid when there has been an actual payment — it may be against his will at the time the money is received. In the cases cited it was distinctly held that a subscription was not invalid, though there was an omission to make the cash payment simultaneously with subscribing.

It was said that the intent of the railroad act was that no subscription should be valid until ten per cent in cash was paid thereon, and not that it should be invalid if the actual subscription and payment of the money were not simultaneous acts; that writing the name in the subscription book, should be deemed but part of the transaction, and provisional or conditional until the ten per cent is paid; but after payment, and certainly after payment of forty per cent on the subscription, as in Clark's case, and twenty per cent thereon as in the case of Smith, the statute requirement on this point must be deemed fully complied with. In both the cases, the contract was held to be binding on the parties, though at the time of subscribing, no money was paid; in the one case, the party making a subsequent payment on his subscription of $400 which was more than the ten per cent; and in the other, the party never paying any money, but some eight months after subscribing, adjusting and discharging his demand against the company by crediting the latter with the original ten per cent, and a further installment for the same amount, and receiving the balance due to him after

deducting the two sums. The cases in effect, decide that there must be both a subscription and payment of money to make a binding contract, but that these acts need not be simultaneous, the statute being satisfied, and the contract of subscription complete, by a subsequent actual payment, or receipt of the money. And why not? Every substantial object of the statute requiring a money payment of one-tenth of the subscription is answered by the corporation actually getting the money. If the purpose of the requirement be to secure money to the corporation on a subscription to its stock, such purpose is fully accomplished by the payment before or after the subscriber writes his name in the subscription book of the company. Can there be any danbt, but that after a subscription and actual payment in cash of the required sum, the subscriber becomes invested with all the rights of a stockholder in the corporation? Is he a stockholder, when the payment of the money attends the act of subscribing, and not one, or having any rights as such, when the company omits to exact, and he to pay the ten per cent at the moment of subscription, but the corporation subsequently by his act in fact realizes the money? Clearly not. When there has been a subscription unattended by the cash payment, the cases referred to hold that the contract is still imperfect and incomplete. It has no binding force by the mere act of subscribing.

The statute, it is said, requires the payment of ten per cent in money on the amount subscribed, and until that is paid there is no legal or obligatory contract. The subscriber may refuse to make the cash payment and perfect the agreement for stock authorized by the statute. But if the statute be complied with, both in the subscription and actual cash payment of ten per cent, so that the corporation gets the money, though it may not have been paid or received at the time of subscribing, the contract is a valid and obligatory one. The subscriber becomes a stockholder, with the obligation upon him to make full payment for his stock, and with the right, upon such payment, to compel a delivery of it to him by the corporation. When the corporation in this

case got the original ten per cent, and the subsequent calls of thirty per cent, the defendant was clothed with all the rights of a stockholder in the corporation. He could not repudiate his obligations as such nor deny his liability to make full payment for the stock for which he had subscribed. After subscribing and voluntarily giving to the corporation the means of raising money to pay not only the original ten per cent, but further installments of thirty per cent, and the money had been actually received by the company to the extent of forty per cent of his subscription, it is absurd to pretend that he did not become a stockholder or that his subscription was not binding upon him because of the original defect in omitting to make the payment of ten per cent at the time of writing his name in the subscription book. Assume that the statute requires a subscription and payment of this ten per cent in money to concur to make a valid contract for the stock of a railroad corporation and one that will bind the parties. If the directors do not exact the money and the subscriber omits to pay at the time of subscribing it is the doctrine of former cases in this court that the contract remains incomplete and of no binding force. If, however, the money be subsequently paid, the statute is complied with; its object is accomplished by the corporation realizing in money one-tenth of the amount subscribed; all is done that is required to be done to make a valid subscription. And if the contract be not valid and binding before, it must be after the money has been paid or realized by the corporation. In Smith's case nothing was paid at time of subscribing, but eight months afterward he did what was equivalent to a payment of the ten per cent. He paid it by offsetting against the amount his claim for services rendered for the company.

His subscription was held valid and binding upon him; and he was not allowed to allege the original defect in it, viz., omitting to make the cash payment at the time of subscribing, as a defense to futher calls. In this case, the defendant subscribed, but he did not at the time pay the ten per cent in cash. He gave to the company two negotiable

promissory notes for installments, and also for the original ten per cent. These notes were negotiated to, and discounted for the company by the Bank of Lowville, and in that way the corporation not only realized in cash the first ten per cent, but also three subsequent installments of ten per cent each. The notes were afterward paid by the defendant, it may be unwillingly, after he had been advised that he could avoid the subscription on the ground of its original defectiveness. This, however, does not affect the question of a compliance with the statute by the payment of ten per cent of the amount of his subscription. The company actually got the money, and the defendant intended this result. The notes which he gave were in a negotiable form, and, giving them in that form, he authorized and meant that the plaintiff should negotiate them and apply the proceeds in payments upon his subscription. This having been done, the legal effect of the transaction was the same as though he had paid the money himself. At all events, there was a subscription, and, by the subsequent voluntary action of the defendant, there was a payment to, and receipt by the corporation, not only of the original ten per cent, but three further installments of thirty per cent. After this, it is quite too late to allege that the subscription is not valid and binding upon him. Conceding it to have been invalid before the ten per cent in cash was paid to or realized by the corporation, it was a valid subscription from the time the money was realized. If the original subscription was not binding upon the defendant because of the omission to pay ten per cent in cash at the time it was made, his subsequent acts cured the invalidity. He became bound by it, and cannot now be permitted to allege the original defect in the subscription as a defense to further calls. I think, therefore, on the ground assumed by the referee, if on no other, his judgment was right.

It is, perhaps, unnecessary to discuss the point whether the contract of subscription was not valid and binding, even without payment of the ten per cent in money. Uncontrolled by former decisions of this court, I should have been of the opinion that the contract was complete when the books were sub-

scribed, and that it did not depend upon a payment by the subscriber, of any portion of the amount subscribed, to give it validity, or binding force. The statute authorizes this corporation to contract for the disposal of its capital stock; it is empowered to open books of subscription, and receive subscriptions, until the whole amount is subscribed. There is thus authority to contract, and the mode of entering into the contract is distinctly pointed out. It is to be done by subscribing the books of the company. If there was nothing further, it would not be questioned that by subscribing a valid contract, and one binding on the subscriber, would be effected for the sum subscribed; nothing would remain to be done to complete it; there would be an agreement to take and pay for the amount subscribed. This promise would be to the corporation, and good by force of the statute. The corporation would be bound to deliver the stock on payment being made. But the section of the railroad act, authorizing the contract, contains this provision; "At the time of subscribing, every subscriber shall pay to the directors ten per cent on the amount subscribed by him in money; and no subscription shall be received or taken without such payment." (Laws of 1850, chap. 140, § 4.) Suppose, however, this provision is not observed—the subscriber omits to pay down the percentage, or the corporation to exact it—is there no valid contract, or rather none at all by which a subscriber is bound? Is this a fair interpretation of the legislative intention? Was it the design of the provision to prohibit any contract for stock of a railroad corporation, unless there was a subscription, and payment of the percentage on the amount subscribed, or that where a party subscribes he shall not be bound, if at the time of subscribing, the directors omit to exact and the subscriber neglects to make the money payment? I think not.

I do not think payment was necessary to complete the contract of subscription. The law does not declare a contract for railroad stock to be void, unless the party both writes his name and the amount he proposes to take in the books of the corporation, and pays down in cash ten per cent of his subscrip-

tion; or that if he subscribes and omits to pay there is no binding contract, or no contract at all. The directors are forbidden to receive a subscription, without the payment of the ten per cent in money; but if they do receive it without exacting payment of the money, it is not declared that the contract entered into in the mode prescribed, viz., by subscribing the books opened by the company, shall be invalid, and bind nobody. The payment of the ten per cent is not, in terms, made a statutory element of a complete and valid subscription. The provision was obviously intended for the benefit of the corporation, and all that might become interested in its affairs, and I think might be waived at the request of the subscriber without impairing his legal obligation, arising out of his subscription. It is undoubtedly an illegality for the directors to receive a subscription without the payment of ten per cent in money, but such illegality does not enter into, or form a portion of, the contract of subscription. It is rather incidental and collateral, and is not inherent in the contract and forms no part of the consideration. The directors may be liable for a breach of duty; but so far as the subscriber is concerned his obligation to pay arises when he subscribes, and I think it remains until it is discharged by payment. A contract is not void as against a statute unless founded upon an illegal consideration which enters into and forms a part of the contract, or unless it provides for the doing of something distinctly forbidden. Neither of these illegal elements exist in a contract such as is involved in this case. It is lawful to subscribe and pay for railroad stock. It is the duty of the directors to exact, and of the subscriber to pay ten per cent of the amount at the time of subscribing. But if this be omitted the contract remains unaffected, and the obligation to pay still exists, as the only thing forbidden is the omission to exact payment of the ten per cent at the moment of subscription.

Had, therefore, no money been paid to, or realized by the plaintiff, I should for myself have been of the opinion that a subscription such as is involved in this case would be valid and binding on the subscriber. I can find no reliable

authority to the contrary before the two recent cases in this court referred to. These hold that a subscription is not enough, but that the ten per cent must be paid before there is a valid and binding contract under the statute. Within the principle, however, of these cases the judgment of the referee was correct.

The order of the General Term granting a new trial should be reversed, and the judgment of the Special Term affirmed.

JOHNSON, J. (dissenting.) The statute requires every subscriber to the capital stock of a railroad company to pay to the directors ten per cent on the amount subscribed by him, in money, at the time of subscribing, and provides that no subscription shall be received or taken without such payment. (2 R. S., 5th ed., 669, § 4.) If, therefore, no such amount was paid by the defendant in compliance with this provision of the statute, the subscription never took effect, or became obligatory upon him, and this action cannot be maintained. It cannot require either argument or authority to show that the law will never aid a party to enforce a promise or agreement which it prohibited him from taking, or entering into. This provision is not for the benefit or convenience of the corporation simply, but is founded in wise considerations of public policy. The prohibition is absolute and unqualified unless the condition is complied with on the part of the subscriber, and the subscription can never ripen into a legal and binding obligation while such condition remains unperformed. It remains to be considered, therefore, whether there has, at any time, been any payment of money or its equivalent, to the plaintiff by the defendant which will satisfy the statute. The fact is established by the finding of the referee, that the defendant at the time of subscribing, instead of paying ten per cent on the amount subscribed in money, gave his promissory note for that amount in the place of such payment, which was afterward surrendered upon the subscription being reduced from $1,000 to $700, and two negotiable notes given, including the ten per cent and several subsequent calls. That

the giving and receiving of these promissory notes were not payments in money must be conceded. That proposition is too plain to admit of controversy. If they operated as payments at all, it was only *sub modo*, by new and additional promises of payment in money at a future day. The notes when taken were mere choses in action and not payment in money. If authority on this question is needed it is found in *Crocker* v. *Crane* (21 Wend., 211). The case, then, comes to this, whether the payment by the defendant of these notes to the holder, the bank of Lowville, was such a payment as the statute contemplates, and renders the previously void subscription valid. This court held in the case of the *Black River and Utica Railroad Co.* v. *Clarke* (25 N. Y., 208), that the payment of the ten per cent after the day on which the subscription was written was sufficient, and rendered the subscription binding; that the subscription in such a case would be regarded as having been begun on the day when it was written and completed on the subsequent day when the ten per cent was paid. In that case however the payment was to the company directly, or to its authorized agents by the defendant. And so in the case of *Beach, Receiver*, v. *Smith*, decided at the last March Term, where the company was indebted to the defendant for professional services rendered, and instead of passing the money back and forth, an amount exceeding ten per cent of the subscription was paid by crediting it upon the account which was then due, we held that this was, in substance and legal effect, a payment in money.

It must be confessed that the court, in these cases, has been quite liberal in its interpretation of this statute, regarding substance rather than mere letter and form. It has, however, as it seems to me, gone already quite as far as it can safely go in this direction, and preserve the substance of the statute. The statute requires the ten per cent to be paid to the directors, at the time of subscribing, in money. In the present case there has never, at any time, been any payment by the defendant, in money or its representative, to the directors or any authorized agent of theirs. He gave his

promissory notes, which were entirely void so long as they remained in the plaintiff's hands, for want of consideration to support them. They became valid notes against the defendant in the hands of the Bank of Lowville, not because they were founded upon a good consideration, but simply because the holder took them before they became due, in good faith without notice that they had no consideration to support them. And when the bank undertook to collect them by action, and received the money it was in no respect as the agent of the plaintiff, but simply as owner and holder of the instrument, and on its own account. The defendant, in the transaction, has not paid his money to the plaintiff either in fact or in law. He could have avoided his notes in the plaintiff's hands, while there they were neither money nor valid choses in action. They became valid and binding against the defendant, upon the transfer, by operation of law, and not by the defendant's volition. He paid because the law obliged him to pay the holder, but he did not pay to the plaintiff. The money which the plaintiff obtained of the Bank of Lowville, upon the transfer of the notes, was not the defendant's money in any sense, legally or equitably. The plaintiff in transferring these notes, was not acting as the defendant's agent in raising the money, in any legal sense, and no farthing of the defendant's money has ever come to the hands of the plaintiff, upon the subscription. No money having been paid at any time by the defendant to the plaintiff, the subscription remained as it was at the beginning, a mere dead form. The giving of the note did not vitalize it, nor did the payment of the note to another as holder after action brought upon it. There has been no such payment upon the subscription, as the statute requires to make it valid, and no action can be maintained upon it. The order of the General Term reversing the judgment was right and should be affirmed.

WRIGHT J., reads for reversal; DENIO, Ch. J., concurs, not on concluding part of WRIGHT'S opinion—there was no contract to pay the note on which the company could recover; but subsequent payments validated the subscription. The

note was authority to the company to borrow money on his credit, with authority to bind him by estoppel from setting up defense. The subsequent collection from him under such estoppel is equivalent to voluntary payment. DAVIES, INGRAHAM and SELDEN, JJ., concurring with Chief Judge. JOHNSON and HOGEBOOM, JJ., for affirmance. MULLIN, J., (of counsel) took no part.

Judgment reversed.

JOEL TIFFANY *State Reporter.*

Duncan McGregor, Appellant v. James McGregor, Respondent.

The disabilities of an alien under the statute (2 R. S., 69, § 3) from acting as an executor, apply only to those who are both alien and non-resident.

Such disability does not attach to a non-resident citizen of the United States.

An ill-regulated temper and lack of self-control have no such relation to the qualities of *prudence* and *understanding* as to disqualify the person subject thereto for discharging the trust of executor.

The statute contemplates that a non-resident, being appointed an executor, may, on executing the proper bond with sufficient sureties, receive letters testamentary. (2 R. S., 70, § 7.)

Appeal from the judgment of the Supreme Court, affirming the order of the surrogate granting letters testamentary to the respondent.

James McGregor died in February, 1853, leaving a will with a codicil annexed by which three of his sons, the respondent, the appellant and Gregor were appointed executors. The will was admitted to probate in December, 1855, after a contest before the surrogate. An appeal was taken to the Supreme Court, and from that court to the Court of Appeals, from that order, and much other litigation arose under the will delaying the issuing of letters testamentary. The testator's son Gregor died in 1845. The respondent in the mean time had removed to and become a resident of one of the Western States. He, in the year 1861, applied to the surrogate of Saratoga county for letters testamentary to be issued to him. The respondent appeared and filed with the surrogate objections to the granting of the application. The objections were fourteen in number, only three or four of which were argued or insisted upon on this appeal. These are: 1. That the applicant was a non-resident of this state and a resident of the state of Wisconsin or Iowa, and therefore an alien. 2. That he had not sufficient understanding, and was subject at times to fits of mental aberration of such a nature as to render him unfit and incompetent at times to perform the duty of an executor. 3. His distant

residence. 4. That by opposing the probate of the will he had renounced the executorship. Much evidence was taken before the surrogate on several of the objections which are now abandoned. On the subject of the alleged mental aberration considerable testimony was taken before the surrogate, which it is unnecessary to set forth, as the appellant's evidence is clearly insufficient to make out a *prima facie* case, and tends only to prove that the respondent is a man of violent temper and given to the use of rash and violent language when excited. It was proved that he resisted the admission of the will to probate, and his residence in another State was undisputed. The respondent was born in this State, of which his father was a resident and citizen, and removed from this to another State, never having resided out of the United States. The surrogate, after hearing the proofs, overruled the objections and granted the letters as prayed for upon the respondent filing his bond and taking the oath. From that order the appellant appealed to the Supreme Court of the fourth district, where the order was affirmed, and he now appeals to this court.

G. Stow, for the appellant.

W. A. Beach, for the respondent.

Johnson, J. The first fourteen pages of the points submitted by the appellant's counsel are devoted to an argument to establish the proposition that the respondent, by reason of non-residence in this State, and his residence in another State within the United States, is an alien, and so incompetent to serve as an executor by statute. This proposition is so obviously erroneous and untenable, that little, if anything more than a bare statement of it, is necessary to its refutation. Our statute, amongst other persons declared to be incompetent to serve as executor, specifies "an alien residing out of this State." Bouvier, in his Law Dictionary, title, "Alien," defines an alien to be "one born out of the jurisdiction of the United States, who has not since been naturalized under their constitution and laws." This is the general and

popular understanding of the term, and is the sense in which it is employed in the statute. The respondent is conceded to be a native of this State, and though not an inhabitant thereof at the time the will was proved, was not an alien, and not incompetent on that score.

Upon the subject of the incompetence of the respondent, by reason of the alleged occasional mental aberration, or general want of understanding, it is enough to say that he has been adjudged otherwise by the surrogate. The statute declares those not competent to serve, "who, *upon proof*, shall be *adjudged* incompetent by the surrogate, to execute the duties of the trust by reason of drunkenness, improvidence, or want of understanding." The surrogate has held upon the proof before him that the understanding of the respondent is not affected by any of the causes alleged, and that he is not for that reason incompetent to execute the duties of the trust. An examination of the proof before the surrogate, will show, that there is no reasonable pretense for saying that any error has been committed in this respect. Residence out of the State does not disqualify, unless the person is an alien, and the distance of his residence in no respect affects his competence to serve. If the applicant is a non-resident of the State, he is not entitled to letters until he has executed the requisite bond, which has been done by the respondent in this case. There is no reason whatever for claiming that the respondent has renounced his appointment. The letters in question have been granted at his express request, and after the most determined and strenuous opposition. It is not pretended that he has executed any instrument in writing to that effect, nor that his renunciation has been declared or decreed by the surrogate according to the provisions of the statute. There is no authority for the position that offering the probate of a will finally admitted to probate, and favoring the probate of another instrument as the will, which is rejected, is in law a renunciation. No statute or court has so declared, and the acts themselves have no relation whatever to the question of the acceptance, or renunciation of the appointment, after the will has been proved.

The statute (2 R. S., 69, § 1) makes it the duty of the surrogate, when any will of personal estate shall have been admitted to probate, to issue letters testamentary thereon to the persons named therein as executors, if they are by law competent to serve as such. It then provides who shall be deemed incompetent to serve as an executor. I am of the opinion that any person appointed or named as executor in a will is to be deemed competent, unless he is declared incompetent by statute, and that it is the duty of the surrogate to grant letters to every person named as executor in a will, upon his application, who is not declared incompetent to serve by statute. He has no discretion to exercise in the matter, but must obey the requirements of the statute, which is the sole source of his power. To allow surrogates to invent new causes of disqualification and add to those prescribed by statute would be conferring novel and dangerous powers upon these officers of special and limited jurisdiction. But in any view of the case, the respondent was clearly competent to serve as executor, and having applied for letters in pursuance of his appointment by the will the surrogate had no right to refuse them. The appeal seems to me to be entirely without merit. The judgment of the Supreme Court is therefore right, and should be affirmed.

Denio, Ch. J. The counsel for the appellant has laid before us a very ingenious printed argument to sustain the position that the respondent is disqualified from acting as executor by the spirit of the provision declaring *an alien not being an inhabitant of this State* incompetent to serve in that office. (2 R. S., 69, § 3.) The respondent is a native of this State, but, at the time of applying for letters testamentary, was domiciled in the State of Iowa. He was not an inhabitant of this State, but he was not, in any sense known to the law, an alien. It would be quite preposterous to say that a native born citizen of this State becomes an alien to its laws by going to reside in another of the States in the Union, or even in a foreign country. (See *Ludlam* v. *Ludlam*, June Term, 1863.) If even the respondent had been

born in Iowa, he would have been not only a citizen of the United States, which would have been sufficient to take his case out of the disability of this statute, but he would, moreover, have been a citizen of this State. The provision of the federal constitution which declares that the citizens of each State shall be entitled to all privileges and immunities of citizens of the several States, precludes the objection of alienage from being set up in any State against a person born in any of the United States, and constitutes all such persons, for all legal purposes, citizens of each State in the federal Union. (Art. 4, § 2; *Lemmon* v. *The People*, 20 N. Y., 562, 607.) They are not, it is true, resident citizens of any State except the one in which they are domiciled, and cannot claim any rights belonging peculiarly to residents, out of their own State. But the statutory disability attaches only to such as are both aliens and non-residents. There is no reason to suppose that the term *alien* was used in this statute in any other than its legal sense. That is at the same time its popular meaning, and the word when used simply and without any qualifying language cannot have any other signification than the one which the law and common parlance affixes to it. This alleged ground of disqualification cannot, therefore, be sustained.

The fifth class of persons declared by the statute to be incompetent to serve as executors are those who, upon proof, shall be adjudged incompetent, by the surrogate, to execute the duties of such trust, by reason of drunkenness, *improvidence*, or *want of understanding*. This language, doubtless, confers upon the surrogate a broad jurisdiction, as the nature of the subject eminently required. Taken in connection with the other classes of disqualified persons mentioned in the same section, it assumes that there are those who are generally competent to make contracts, and who are neither idiots, lunatics, or persons of unsound mind, in the eye of the law, to whom it would yet be unfit to intrust the administration of the estate of a deceased person, though they should be selected for that purpose by the testator. The defects alleged in the present case are *improvidence* and

want of understanding. The surrogate and the Supreme Court have not been able to find, in the proof which has been taken, sufficient evidence to enable them to pronounce against the respondent in either of these respects. Upon a careful reading of the printed testimony, I have come to the same conclusion. The result of the evidence seems to be that the respondent is a competent man of business, of at least the average grade of intelligence. If he had been habitually or generally neglectful of his pecuniary and business affairs, or extravagant or wasteful, to an extent to deserve the character of an improvident man, the fault would have been likely to show itself in the condition of his own estate and pecuniary interests. But the evidence does not show him to be embarrassed or pecuniarily insolvent. For aught that appears, he has a competent property, and is ordinarly prudent and cautious in its management. If, therefore, he shall prove faithless in the administration of the estate of his deceased brother, it will not be from inherent defects of character of the nature referred to, but from some other and probably less excusable faults of which the statute does not take notice.

The evidence certainly does disclose defects of temper which have sometimes exhibited themselves in a marked degree. It appears that the will of the deceased, which has been admitted to probate, was contested before the surrogate on the allegation that it had been revoked or superseded by a later testamentary disposition. This later will was propounded by one Buell, who took valuable interests under it, and with whom the respondent acted in concert in the situation. But it was pronounced against by the surrogate, and the earlier will admitted to probate, and the determination was finally affirmed in this court. The respondent's brother, Duncan McGregor, the present appellant, presented the first will, and was the principal party on that side of the controversy. There was another litigation to which the respondent was a party which involved the title to a tract of land in Iowa claimed by him, and upon which a town had been built, in which his brother, the present appellant, was united in feeling and action with the other party to the controversy.

These several lawsuits gave rise to a very angry state of feeling on the part of the respondent toward the appellant; and the only portion of the evidence in the present case which materially inculpate the former, consist in angry and intemperate expressions respecting his brother and other persons whom he assumed to be connected with him in these controversies. According to his testimony he repeatedly accused them of perjury, threatened to have them convicted and sent to the State prison, and was, on some occasions, so much excited in manner and language that persons who heard him thought him scarcely in his right mind, and some even believed him temporarily insane. I perceive no justification or even palliation for this angry and revengful state of feeling on his part. If an ill-regulated temper, and lack of self-control, and the resort to abusive language toward a near relative, who was to be associated with him in the trust, were among the disqualifying causes, I should have no hesitation in declaring the respondent unfit for the office of executor. But such grave faults have no natural relation to the qualities of prudence or imprudence; nor do they denote a want of understanding in the sense of the statute. They may render him a disagreeable associate for the respondent, and make the transaction of business between them unpleasant and annoying; but the law does not contemplate the setting aside of an executor named by the testator for such reasons. The selection of executors is not committed to the surrogate's court. The testator is allowed to appoint such persons as he may see fit, provided that they do not fall within the classes of incompetent persons mentioned in the statute.

The evidence of intemperate expressions and conduct on the part of the respondent falls very far short of making out a case of lunacy or monomania, either permanent or temporary, as respects the respondent.

The statute clearly contemplates that one named as executor may receive letters testamentary though he be not a resident of the State. The provision is that the letters shall be withheld from a non-resident until he shall execute such

bond, with surety, as is required of administrators. (2 R. S., 70, § 7.)

It may chance that the respondent had conveyed away, without consideration, his interest in the estate of the deceased, as legatee and devisee, to his kinsman Buell; but I do not see that this circumstance has any bearing upon the questions involved in this appeal. It is not necessary that an executor should take an interest under the will, and the alienation of an interest actually given is not, therefore, a disqualification. If it should be said that it indicates a disposition improperly to favor Buell, who had failed in establishing the later testamentary disposition which was rejected, it does not furnish a strange motive for an unjust or partial administration for the benefit of that interest that he would have had if he had continued to hold it himself.

I conclude that no error was committed in granting letters to the respondent, and am of opinion that the judgment appealed from should be affirmed.

All concur; Selden, J., not voting.

Affirmed.

OLIVE ESTHER BUCKLIN, Respondent, v. GEORGE R. BUCKLIN, *et al.*, Appellants.

Where the rights of creditors do not stand in the way, it is perfectly lawful for a parent to make provision by gift, present or testament, for his children.

A voluntary executory gift will not always be enforced by the courts; but an executed one is as valid as though based upon a full pecuniary consideration.

A mortgage is an executed conditional transfer of the estate mortgaged. In judgment of law, any conveyance which would be sufficient to pass the title to the purchaser, conveys it to the mortgagee.

A mortgage is not to be regarded as a disposition of land by deed within the meaning of the article of the Revised Statutes respecting uses and trusts.

A trust of personalty is not within the statutes of uses and trusts, and may be created for any purpose not forbidden by law.

The statute of limitations does not commence running against an infant *cestui que trust*, although her right to foreclose the mortgage accrue to her more than ten years before she becomes of age.

SUIT to foreclose a mortgage. The plaintiff is the daughter of William Bucklin and Esther his wife, both now deceased. The mortgage was contained in an instrument executed by the plaintiff's father, William Bucklin, dated September 22, 1836, and which was duly acknowledged and recorded on the same day. It recites that Esther Bucklin, the wife of said William, had theretofore, by one Vedder Green as her next friend, filed a bill of complaint against her said husband in the Court of Chancery, charging him, among other things, with the exercise of such cruel and inhuman treatment toward her, as to render it unsafe and improper for her to cohabit and live with him, and prays for a decree of separation from bed and board, and for a separate maintenance out of his property, and that she might retain the care and custody of the plaintiff, their infant daughter (then about three years of age), and recites also that an injunction had been issued, restraining the father from taking possession of or molesting the child. It further recited that, with a view of staying further proceedings on the part of his wife, William Bucklin had agreed to make a suitable and proper provision for the support and maintenance of his said wife and daughter, separate and apart from himself, and had also

agreed to convey to his daughter, real estate of a certain value (stating an agreement to the same effect as that subsequently mentioned in the instrument), and that the said injunction should remain in full force and effect, and that the said suit in chancery should not be discharged or discontinued, but that proceedings therein should for the present be discontinued. The instrument then proceeds as follows: "Now, for the purpose of securing the performance by the said William, of the aforesaid agreement and covenant on his part to be performed, this indenture witnesseth, that the said William Bucklin, in consideration of the premises, and also in consideration of the sum of one dollar paid to the said William by the said Vedder Green, the receipt of which sum is hereby confessed and acknowledged, hath granted bargained, sold, aliened and confirmed, and doth hereby grant, bargain, sell, alien, convey and confirm unto the said Vedder Green, and to his heirs and assigns forever, the following described lands and tenements to wit: [describing the mortgaged premises, being a farm in Herkimer County] being the farm now occupied and possessed by said William Bucklin; to have and to hold the same to the said Vedder Green, his heirs and assigns forever. Provided always, and these presents are upon this express condition, if the said William Bucklin shall, within the period of six months from this date, convey to Olive Esther Bucklin, the infant daughter of said William and Esther Bucklin, real estate of the value of one thousand dollars; which real estate shall consist of a dwelling house, garden and other lands, and shall be conveyed by a good and sufficient warranty deed, and shall at the time of said conveyance be free and clear from all incumbrance; and if the said William shall further suffer and permit the said Esther Bucklin, during the joint lives of said William and Esther, to occupy, possess and enjoy the said real estate free from the molestation and hindrance of said William for the benefit of said Esther, the daughter aforesaid; and if the said William, during the joint lives of said William and Esther, shall pay to the said Esther the sum of three hundred dollars annually, to be paid on the first

day of the months of February and August in each year, reckoning from the first day of August last; and if the said William Bucklin shall suffer and permit the said Esther Bucklin, during the joint lives of said William and Esther, to have the care, control, custody, management and education of said Olive Esther Bucklin, without any interference on the part of said William; and if the said William shall also, within one week from this date, deliver to said Esther, at the dwelling-house of said William, all the household furniture now in his possession, which said Esther carried to said house when she went there to reside, or at any time afterward; and shall also at the same time deliver to said Esther such other household furniture as the said William or said Esther may choose to select; and if the said William shall within the period of one month from this date deliver to the said Esther one horse, one set of harness, and one pleasure carriage or pleasure wagon, which horse, wagon or carriage and and harness shall be of the value of one hundred and twenty dollars; and shall also within the period last aforesaid deliver to the said Esther one good cow; all which household furniture, horse, wagon or carriage, harness and cow shall be under the exclusive control and management of said Esther during the joint lives of said William and Esther, and shall remain the property of said Esther if she shall survive the said William, then in such case, this indenture and every part of the same shall be void. And it is hereby declared that this mortgage is given to the said Vedder Green in trust for the benefit of said Esther Bucklin and her infant daughter the said child Olive Esther Bucklin. And in case the above conditions on the part of said William expressed to be performed and kept, or any of them shall be broken; and it shall at any time hereafter be necessary to enforce this mortgage, the amount that shall be recovered on said mortgage shall be secured for the benefit of the said Esther and her infant daughter or the survivor of them." The complaint alleged a waiver of that part of the agreement which called for the conveyance of land, but admitted the delivery of the personal property, and the payment of the annuity to her

mother during her life. It alleged that the trustee, Green, died in Oswego county in the year 1841, and that she, the plaintiff, had been recently appointed by the Supreme Court, to execute the trust which had been vested in Green, and to bring the present action.

The defendant answered admitting the execution of the instrument, but setting up that it was without consideration, and that William and Esther Bucklin, during their lives, had settled their difficulties, became reconciled to each other, and again cohabited together. They claimed to be owners of the mortgaged premises under William Bucklin, and alleged that no claim had been made against them by either the trustee, or by the plaintiff. They relied upon the statute of limitations in the following manner: "And for a further answer to the compaint, the said defendant says that no part of the said cause of action, accrued within twenty years next before this action, and that the defendants plead the statute of limitations to said claim of the said plaintiff."

The case was tried before Mr. Justice BACON without a jury. His conclusions of fact affirmed the execution of the instrument set out in the complaint. They further stated the death of the plaintiff's mother in the year 1843, and of her father in the year 1844; the death of Green, the trustee, in 1841, and the appointment of the plaintiff as trustee by the Supreme Court in 1857. They negatived the alleged reconciliation of William Bucklin and his wife or that they ever cohabited together after the execution of the mortgage, though it was stated that they resided in the same house for a short time. The judge found a breach of the obligation to convey land to the plaintiff, and that the defendants were in possession of the mortgaged premises. The evidence showed them to be worth over $9,000.

As conclusions of law the judge held that the mortgage was fulfilled and that the plaintiff was entitled to a judgment of foreclosure and sale, and to have paid to her out of the proceeds $1,000, and interest from the 22d of March, 1837, the expiration of the time fixed for the mortgagees to perform.

After an affirmance of the judgment at a General Term the defendants brought this appeal.

F. Kernan, for the appellants.

J. H. Reynolds, for the respondents.

DENIO, Ch. J. The mortgage, so far as it is now sough to be enforced, was created, among other objects, to secure to the plaintiff, then an infant of tender age, a portion of her father's property, to aid in her maintenance during her infancy, and to furnish her with a small independent estate in real property. The differences which had arisen between her parents presented the occasion for this gift; but its validity did not depend upon the merits of that controversy, nor yet upon the legal effect of the agreement for a separation between her father and mother, nor upon the legality of the provisions made by the former for the latter. The contract, so far as it relates to that provision, has either been performed or it is now incapable of performance. The party entitled to its benefits has been long dead, and it does not appear that she left any representative capable of enforcing any of its stipulations which were not performed at her death. Moreover, this suit was not brought to recover such an interest. But the plaintiff survives, and is entitled to the settlement attempted to be made in her favor, provided it was legally valid when made, and provided her rights have not been lost by lapse of time.

1. Where the rights of creditors do not stand in the way, and there appears not to have been any in this case, it is perfectly lawful for a parent to made such provision out of his estate for a child or children, by present, gift, or by testament, as he may think proper. There are cases in which a voluntary executory gift will not be enforced by the courts; but an executed one is as valid as though based upon a full pecuniary consideration.

A mortgage is an executed conditional transfer of the real estate mortgaged. In judgment of law, any conveyance which would be sufficient to pass the title to a purchaser

conveys it to the mortgagee. The instrument executed by William Bucklin to Vedder Green would be a perfect deed of bargain and sale but for the condition by which it was to become void upon performance of the agreement. It expresses a pecuniary consideration which, though nominal, is as adequate to waive a use as though it were the full value of the land; and though it may not have been paid, the defendant is estopped by his deed from denying its payment. By the Revised Statutes it is denominated a grant, but for all substantial purposes it has the effect of a deed of bargain and sale. (1 R. S., 738, 739, §§ 137, 138, 142.) At common law, and before the jurisdiction of courts of equity to relieve against forfeitures had been established, this deed would have vested in the trustee an estate in fee simple defeasible only by the performance of the conditions. This is of course a technical view of the nature of a mortgage.

By applying to the transaction the equitable doctrines of the courts of equity, now also recognized to a great extent by the courts of law and by modern statutes, the mortgage is simply a security for the payment of the money it was given to secure, and the mortgagor continues to own the land, while the mortgagee's interest is that of a creditor simply. But the defendants' position is formal also. They insist that courts of equity will not decree the performance of a voluntary executory agreement even where the subject is a portion intended for a child or other relative, and authorities are referred to to sustain that position. (*Duval* v. *Wilson*, 9 Barb., 487 and cases cited, but see *Souverbye* v. *Arden*, 1 Johns. Ch., 240, 266, and cases referred to by Chancellor KENT.) If the settlement be an executed one like a deed or mortgage, the doctrine relied on has no application. The title of the mortgaged premises is transferred by legal conveyance. The mortgagor retains an equity of redemption equivalent, for many purposes, to a general ownership of the land, but yet in point of form, an equity. The mortgagor may, it is true come into a court of equity to enforce his mortgage, as the mortgagee must in order to redeem The reason why a mortgagee must resort to equity is not because

the mortgage, is an executory transaction, and requires the aid of a court of chancery, to compel a specific performance. On non-performance of the conditions the mortgage is forfeited at law, but the equity of redemption remains in the mortgagor or his representatives. No prospective language of the parties which can be written is strong enough to produce the forfeiture of that equity, which can only be extinguished by a decree, or an equivalent proceeding, under a positive statute. This rule is expressed by the phrase "once a mortgage always a mortgage." The mortgagee cannot destroy this equity except by a suit in chancery or a statute foreclosure, namely, he could bring ejectment to get possession of the estate, after forfeiture at law, but that is now forbidden by statute. Still if he can be got into possesssion without a breach of the peace, his title under the mortgage deed is strong enough in law to enable him to defend an ejectment brought by the mortgagee. (*Mickles* v. *Dillaye*, 17 N. Y., 80; *Mickles* v. *Townsend*, 18 id., 575.) The plaintiff brings her suit in equity, not for the purpose of being aided in establishing her mortgage under the notion of remedying a defective conveyance, or obtaining a specific performance, but to foreclose and extinguish the defendants' equity of redemption, which a court of law is not competent to deal with. She does not come to establish a voluntary equitable agreement, but to enforce a legal title under an executed conveyance, and to cut off an equity attached to that legal title and vested in the defendants.

A point is made that the mortgage is invalid because made to Green as a trustee, he confessedly having no beneficial interest, and because the purposes of the trust not being such as are contemplated by the fifty-fifth section of the chapter of the Revised Statutes relating to uses and trusts. Now, although for the purpose of showing that a mortgage is an executed conveyance, and not a mere executory agreement, I have recurred to the legal nature of that instrument as a conveyance of the land mortgaged, I am not prepared to concede that it should be regarded as "a disposition of the land by deed" within the meaning of the article of the Re-

vised Statutes respecting uses and trusts. The modern idea of a mortgage is a pledge of the land to secure the payment of money. The statute relates to interests in lands, property so called, and not of collateral pledges made for the purpose of securing interests in personalty. Debts secured by mortgage are declared to be personal assets, and go to the personal representatives. (2 R. S., 82, § 6, subd. 8.) A trust of personalty is not within the statutes of uses and trusts and may be created for any purpose not forbidden by law. This mortgage is not, therefore, at all within the influence of the fifty-fifth section, or within the one which abolishes uses and trusts. But if it were otherwise, and if the interest in the land conveyed by a mortgagor to a mortgagee were regarded as within the purview of that section, the only effect in this instance would be to annihilate the title and strike out the name of Green, the trustee, and to invest the beneficiaries with the title nominally conferred upon Green. This effect is produced by the forty-ninth section of the article, which declares that if a disposition of land be made to one or more persons to the use of or in trust for another, no estate or interest, legal or equitable, shall vest in the trustee; and the forty-seventh section, which confers upon the beneficiary in such cases an estate of the same quality as his beneficial interest. Again, a trust may, by the fifty-fifth section, also be created to sell lands for the purpose of satisfying any charge thereon. This does not require a pre-existing charge. One created at the same time and by the same instrument which contains the conveyance would be sufficient to bring the disposition within the terms and spirit of the section, and would embrace the case of a mortgage.

I think, therefore, that the instrument contained a valid mortgage of the land described in it, and that it was an available security for the performance of the contract to purchase and convey lands to the value of $1,000 to and for the benefit of the plaintiff.

2. The remaining question is whether the plaintiff's rights have been lost by the failure to prosecute in time. The time within which William Bucklin was to have made the

conveyance, expired the 22d March, 1837, and this action was commenced the 18th January, 1858. The delay was nearly twenty years and ten months. The defendants do not set up that the condition has been specifically performed, or that anything has ever been paid as an equivalent, or as damages for the non-performance. They rely upon the lapse of time, and, in terms, plead the statute of limitations.

The rules respecting the time for commencing actions, as it affects this case, are those prescribed by the Revised Statutes, there being a saving in that respect as to cases in which the right of action had accrued, by section seventy-three of the Code. The form in which the defendant is to avail himself of this defense, that the action was not commenced in time, is prescribed by the Code, which declares that the objection that the action was not commenced within the time limited can only be taken by answer. (§ 74.) This rule of pleading applies to the former law of limitations as well as to that established by the new system. But I think the answer is sufficient, though in a very general term.

The Revised Statutes provide that, after the expiration of twenty years from the time a right of action shall accrue upon any sealed instrument for the payment of money, such right shall be presumed to be extinguished by payment. (2 R. S., 301, § 48.) The case is not within this provision, because this mortgage is not an instrument for the payment of money but for the conveyance of land. Moreover, that provision relates to actions at law, and the Revised Statutes have furnished distinct and different limitations for such actions, and for suits in equity. (2 R. S., pp. 299, 300, 301.) There is a separate article devoted to the time of commencing suits in courts of equity. (Art. 6.) Such remedies were not denominated *actions*, until the Code prescribed a new nomenclature. The fifty-second section of the sixth article contains the limitation applicable to this case. It declares that bills for relief in case of the existence of a trust not cognizable by the courts of common law, *and in all other cases not herein provided for*, shall be filed within ten years after the cause thereof shall accrue, and not after. The next following section, pro-

vides that if the person entitled to file any bill specified in the preceding sections be, at the time the cause for filing such bill, under any of the disabilities mentioned in the prior articles, the time during which such disability shall continue shall be excluded from the limitation contained in the last section. (§ 53.) The plaintiff, it is contended, first became entitled to commence this suit on the death of Vedder Green in February, 1841. She was then an infant, and infancy was one of the disabilities referred to. She arrived at the age of twenty-one in 1854, and commenced this suit in 1858, four years afterward. But the cause for relief accrued while Green, in form, held the interest as trustee, and for nearly four years prior to his death, he might have filed a bill for the foreclosure of the mortgage. If, however, we add together these two periods — that during which Green might have sued, to that which elapsed between the plaintiff's majority, and the time of bringing this action, the time will yet fall short of ten years. The plaintiff was not, therefore, barred of her action, unless she is precluded from availing herself of her disability on account of the statute having commenced to run when the mortgage was forfeited, in the time of the trustee. On this point the provision of the statute is, "that no person shall avail himself of any disability enumerated in this title, unless *such* disability existed at the time his right of action or of entry accrued. (2 R. S., 300, § 41.) The right of action accrued to *her* while she was under disability. But this is not precisely what is intended. If there are successive owners of the cause of action, or of equitable relief, and the right to prosecute arises in the time of the first, the period of limitation commences at that time and continues attached to the demand during the several subsequent changes of both; and when the statute period is elapsed, the demand is barred, though the last proprietor had recently acquired his right. The statute refers to the time when the right to enforce the particular cause of relief accrued to the person who then possessed that right, otherwise the demand could be kept in force indefinitely by successive devolutions of title. The strict language of the statute would not apply to the

plaintiff because she was an infant when the right to prosecute accrued to Green. But her disability at that time is not important, if she had not then the right to prosecute. If the statute commenced running against the equitable right to relief at the expiration of six months from the execution of the instrument, the plaintiff's disability when that right devolved upon her at the death of Green would not protect her and the demand would be barred at the expiration of the ten years, which was long before the action was brought.

The idea that the trust which was vested in Green devolved upon the court of chancery, at his death, by force of the statute, (1 R. S. 730, § 68), is not well founded. The title of the Revised Statutes in which that section is found, relates exclusively to real estate, as will be seen by its title and the entitling of the respective divisions, and by an examination of its several provisions. This being, as has been shown, a trust of personalty, is not within the purview of these provisions but depends upon the rules of the common law and the doctrines of courts of equity. No doubt these courts, on the application of parties interested in a trust of personal property may supply the defect of a trustee. The beneficiary is the party entitled to institute proceedings for that purpose. Hence the plaintiff, on the death of Green, might have applied for the appointment of another trustee, or, having the entire interest in herself, so far as relates to her rights in the mortgage, she might have filed her bill for a foreclosure.

There is another view of this question which I think avoids the bar of the statute. The interest of the trustee was merely nominal. He had not the slightest interest in the agreement, the performance of which was attempted to be secured by it. The plaintiff was the sole beneficiary as respects the land agreed to be conveyed to her, except that her mother, during her life, had a certain interest in her possession, which interest has long been extinguished. Now a court of equity in which alone mortgages can be foreclosed, takes notice of the *cestui que trust* as well as that of the trustee. The plaintiff was perfectly competent, the moment the mortgagor had broken the condition, to commence a suit against him and

against Green the trustee, to enforce the mortgage by procuring a foreclosure of the equity of redemption and the sale of the mortgaged premises. That is precisely the claim which she asserts and seeks to enforce in the present suit. That right accrued to her at the time of the breach of the mortgage, and she was then under the disability of infancy, which disability continued until about four years before the commencement of this suit. Hence she is within the exception in the statute, and the case is not one of a disability arising after the cause of action had accrued, but of a disability existing at that time, and existing in the person entitled to assert that cause of action. It is not at all like the case of one succeeding to a former proprietor by assignment, descent, devise or bequest. She does not take her interest by any such transfer from the trustee. His title was at all times her title. The cause of action accrued to her at the moment the mortgagee became liable to be prosecuted for a breach of the condition.

Hence I think the statute was not a bar and that the Supreme Court was right and that its judgment ought to be affirmed.

All the judges concurring,

Judgment affirmed.

Duncan McGregor, Respondent, v. James Buell and James McGregor, Jr., Appellants.

It is not proper for the Supreme Court, on the return of a remittitur, to add any new and independent direction to the judgment of this court beyond what may be required to carry that judgment into effect.

The Supreme Court cannot add to the judgment contained in the remittitur a new or further judgment, even for costs of the appeal of that court.

Costs of the appeal to the Supreme Court are given by the statute to the prevailing party only in appeals involving the validity or proof of wills; and not to cases which relate only to the granting or withholding of letters testamentary upon a will, the validity or execution of which were not involved.

The facts in this case, as shown by the return, are, that at the October Term of this court, in 1861, in a case in which the present appellants were respondents, and the present respondent was appellant, after hearing counsel for both parties, a judgment was pronounced, reversing the judgment of the Supreme Court appealed from, "without costs and without prejudice to any future application for letters testamentary," and that the notice of appeal and return thereto and the judgment of this court should be remitted to the Supreme Court to be enforced according to law. The remittitur of this judgment, as set forth in the present return, does not contain the record upon which that judgment was pronounced, and consequently shows nothing beyond what is above stated in reference to the nature of the judgment appealed from, or of the questions involved in the appeal.

The return then sets out a judgment or order for judgment, rendered or made, at a General Term of the Supreme Court at Plattsburgh, in Clinton county, in May, 1863 (under the same title as to parties, appellant and respondents, as that of the former judgment of the court), declaring as follows, viz.: "So much of the surrogate's decision as is appealed from in this case is reversed, with costs of the appeal to de paid personally by the respondents; that the record and proceedings in the action be certified to the surrogate of Saratoga county, together with the order of reversal and award of costs, to be enforced, and that said surrogate pro-

ceed in the matter of granting letters and the disposition of the costs which have accrued in contesting the will according to law." There is nothing in the judgment or order (unless it be by an inference from the similarity of title) to indicate that it had any relation to the case decided in this court.

Next follows a judgment, in what court or where rendered does not appear, but bearing date June 16, 1863, and under the same title as that before mentioned, reciting that the former judgment in that case having been reversed by the judgment of the Court of Appeals, and the record and proceedings of the Court of Appeals having been remitted to that court, to be proceeded upon according to law, and the same having been duly entered in the proceedings of that court, after hearing counsel for both parties, it was ordered adjudged and decreed, that all that part of the decision of the surrogate of Saratoga county entered on the 31st day of December, 1855, which is in these words, "It is also ordered on reading and filing the oath of James McGregor, Jr., and of the executors named in the instrument admitted to probate as the last will and testament of said deceased, that letters testamentary issue unto the said James in the said will; no affidavit having been filed by any person setting forth that he intended to file objections against the granting of such letters. And thereupon James Buell, a legatee named in the aforesaid last will and testament, having made and filed an affidavit setting forth that he intended to file objections against granting letters testamentary unto Duncan McGregor, one of the executors named in the said last will and testament. And thereupon the said surrogate ordered that the granting of letters testamentary unto the said Duncan be stayed for thirty days. It is further ordered, adjudged and decreed by the said surrogate, that there be allowed and paid to Duncan McGregor, from the estate of the said James McGregor, deceased, his taxable costs for witnesses' fees in the matter of the proceedings to prove said will, such fees to be taxed by the surrogate on ten days' notice to James McGregor, the said executor, and to James Buell. It is further ordered and

decreed that there be allowed and paid to Duncan McGregor and James Buell, from the estate of the said deceased, the amount of money which they have respectively paid, and became liable to pay to the surrogate for his fees in the matter of the proceedings to prove said will. It is ordered that the said sum be paid by the above named executor, James McGregor, to the said Duncan McGregor and James Buell respectively, on producing to the executor the receipt of the said surrogate. On motion of the said James McGregor, said executor, Seth Hawley and John H. Thompson are appointed appraisers of the goods, etc., of said deceased;" be reversed, annulled, and altogether held for nothing. It was, also, further ordered, "that the respondents pay to Duncan McGregor, his costs *of this appeal* in this case adjudged at $381.10;" and that, "the surrogate of Saratoga county proceed to enforce payment of the costs awarded to Duncan McGregor, against the said James Buell and James McGregor, Jr., according to the course and practice of the surrogate's court." It was also ordered that said surrogate proceed in the matter of granting letters testamentary, and the disposition of the costs which had accrued in contesting the said will, according to law. Whereupon the proceedings were ordered to be certified by the clerk, and remitted to said surrogate to be proceeded upon according to law.

From so much of said judgment as awarded $381.10 costs to Duncan McGregor, the present appeal was taken by James McGregor, Jr., and James Buell, to this court. The return contains nothing beyond what is above stated, together with the notice of appeal.

The cause was submitted here upon the brief of counsel.

W. A. Beach, for the appellants.

J. Ellsworth, for the respondent.

Selden, J. The record in this case appears to be very defective. This court can look only at the return of the court below, for the facts upon which its judgment is to be given. Facts stated in the opinion of the court below, or

elsewhere, not found in the return cannot be regarded. From the return alone, it is not easy to ascertain what has been decided by the Supreme Court, and still less so, to ascertain the grounds upon which such decision was based. It must doubtless be assumed from the uniformity of the names of the parties (although the fact is not otherwise shown), that the judgment of this court of October, 1861, and the order or judgment of the Supreme Court of May 5, 1863, and that of June 16, 1863, were all parts of the proceedings in one cause; and we may therefore resort to the recitals in the last mentioned judgment, by the aid of which alone we are enabled to ascertain the subject matter, either of the judgment now complained of, or, of the former judgment of this court. From those recitals it appears that the judgment which was reversed by this court, "without costs and without prejudice to any future application for letters testamentary," was a judgment of the Supreme Court affirming a decree of the surrogate of Saratoga county, granting to James McGregor, Jr., letters testamentary upon the will of James McGregor deceased, staying for thirty days, the granting of like letters testamentary to Duncan McGregor, on account of objections filed, against granting such letters giving costs to Duncan McGregor and James Buell, for witnesses fees and expenses in the proceedings to prove said will, and appointing appraisers of the goods of the deceased. Upon filing the remittitur from this court containing such reversal, it appears that the Supreme Court proceeded in accordance with the judgment of this court, to reverse their former judgment, and added a further judgment in these words, viz.: "It is *further* ordered that the respondents pay to Duncan McGregor his costs of *this appeal* in this case, adjudged at $381.10;" and they also ordered the proceedings to be remitted to the surrogate of Saratoga county, with directions to enforce the payment of the costs awarded to Duncan McGregor, against James Buell and James McGregor, Jr., and to proceed in the matter of granting letters testamentary, and the disposition of the costs which had accrued in contesting the will according to law.

The sole question now presented is, whether this further order, awarding costs against James Buell and James McGregor, Jr., can be sustained, that being the subject of the present appeal. It does not distinctly appear from the judgment how these costs accrued. I assume, however, that they were the costs of the appeal, taken by Duncan McGregor to the Supreme Court, from the decree of the surrogate, granting letters testamentary to James McGregor, Jr., and denying them to him. If those costs were allowed to Duncan McGregor by the original judgment of the Supreme Court, no appeal appearing by the record to have been taken against him, from such former judgment, the repetition of the allowance in the present judgment would be unobjectionable. Such, however, does not appear to have been the case, and I understand the respondent's counsel to claim that the allowance was a new or further provision, added by the Supreme Court, to the judgment of this court. If this be the true character of the judgment appealed from, it cannot be sustained. It was not proper for the Supreme Court, on the return of the remittitur, to add any new and independent direction to the judgment of this court, beyond what was required to carry that judgment into effect.

I place no particular reliance upon the words "without costs," because those words would naturally apply only to the costs of the appeal to this court. My judgment would have been the same if these words had been omitted, for the reason that the Supreme Court could not add to the judgment contained in the remittitur from this court, a new or further judgment, even for costs of the appeal of that court. If that course were allowed, it would either deprive the party affected by such *new judgment* of the right of appeal, in regard to it, or would authorize several successive appeals from the Supreme Court to this court, before the case could be remitted to the court of original jurisdiction. It has been often held that no appeal from the Supreme Court to this court can properly be brought until that court, by its judgment, has finally disposed of the whole matter before it, including the right to costs as well as other rights of the

parties. Upon appeal from such judgment, or any part of it, it undoubtedly becomes the duty of this court, to affirm, reverse or modify, the whole judgment, or such part of it as may be appealed from, where the appeal is only from a part. If the judgment of this court fails to determine any part of the subject of the appeal, the defect cannot be supplied in the court below.

It is insisted, by the respondent's counsel, that the costs of the appeal to the Supreme Court are given, by statute, to the prevailing party, and that, consequently, that court was bound to include them in its judgment. (3 R. S. 5th ed., 905, §§ 19, 20). If the case were within this statute, the position of the respondent's counsel might, perhaps, be correct; but the statute applies only to appeals involving the validity or proof of wills, and not to cases, like the present, which relates only to the granting or withholding of letters testamentary upon a will, the validity, or execution of which does not appear by the present record to have been involved in the appeal. In such cases, costs are granted or refused, in the discretion of the court. (3 R. S., 909, § 6; Code, § 471; 22 N. Y., 422.)

To prevent a possible inference of an intention to impute to the Supreme Court, a disposition to overstep its authority, or to disregard in any respect the judgment of this court, it is proper to say that no such opinion is entertained, or intended to be expressed. On looking at the opinion delivered in the Supreme Court, and at the report of the decision of this court on the former appeal (24 N. Y., 166), it appears very probable that other facts exist, not shown by the present record, which might have justified the judgment of the Supreme Court. The transcript from the court below is obviously very defective, as it does not conform to the rules of this court, or to those of the Supreme Court, touching such appeals (Rule 2, Court of Appeals; Rule 44, Supreme Court); but as neither party has asked for any amendment of it, or any further return (Rule 3, Court of Appeals), we can only pronounce judgment upon the record

as it appears before us. The judgment of the Supreme Court, so far as it is appealed from, should be reversed, but without costs of this appeal to either party.

DENIO, Ch. J., WRIGHT, DAVIES and EMOTT, JJ., concurred.

CASHTON R. GILBERT, *et al.*, *v.* WILLIAM GILBERT.*

The provision of the Revised Statutes (3 R. S., 15, § 51) must be construed as abolishing all trusts in land paid for by one person where the conveyance is given to another, whether for the benefit of the party paying the money, or for another, except where the conveyance is so taken without the knowledge or assent of the party whose money is so used—and excepting also in favor of creditors.

INGRAHAM, J. Whether or not the money was paid by the father, upon the condition that the title to the property was to be taken by the defendant in trust, to be conveyed to the plaintiffs after the death of the father, is by no means clear from the evidence. The defendant denies the agreement as positively as the witness Matthews affirms it. The referee has found that such agreement was made, and the only question for us to decide is whether such a trust by parol can be enforced. I understand the statute as applying to all trusts of that character, viz.: Where the title is taken by one person and the consideration is paid by another, whether the trust is intended to be for the benefit of the person paying the money or of a third person. The 51st section (3 R. S., 15) provides where a grant shall be made to one person and the consideration therefor shall be paid by another, no use or trust shall result in favor of the person by whom such payment shall be made, but the title shall vest in the person named as the alienee in such conveyance, and the 52d section provides for the protection of creditors, where the fraudulent intent in taking such conveyance is not disproved.

The effect of this statute, so far as it relates to any interest in the person paying the money, was fully examined in this court by COMSTOCK, J., in *Garfield* v. *Hatmaker* (15 N. Y., 475), in which it was distinctly held that no estate, either

*NOTE.—By inadvertence this opinion was published as the opinion of the court. It is in fact a dissenting opinion. The order of the General Term, ordering a new trial, was reversed and the report of the Referee affirmed.

legal or equitable, remained in the person paying the money, and that the creditor of such person could not by a sale under a judgment and execution, obtain any interest or estate in the property so conveyed, but that there was only a pure trust in favor of a creditor to be enforced only in equity.

In *Sieman* v. *Austin* (33 Barb., 9) a different construction was put upon the 51st section, EMOTT, J., holding that it did not apply to cases where the trust was not for the benefit of the person paying the money. That case is now before this court for review, and it appears that the grantee voluntarily carried out the agreement by conveying the property to the person for whom it was intended. It was not necessary, to the decision of that case, to inquire whether there was any trust that could be enforced.

It is urged that this section does not apply to a case where the estate is taken for the benefit of a third person other than the person paying the consideration money. There might be force in the suggestion if the section only declared there should be no trust in favor of such person, but it goes farther, and declares also that in such cases the title shall vest in the person named as the alienee in the conveyance.

Had it been intended to exclude from the operation of this section cases of trusts for the benefit of third persons, there would have been no necessity for the 53d section, to protect the case of persons, where the alienee, in violation of some trust, shall have purchased lands so conveyed with moneys belonging to another.

These provisions of the statute vest the title to the property in the alienee. They must be construed as abolishing all trusts of land paid for by one person where the conveyance is given to another, whether for the benefit of the party paying the money or for another, excepting where the conveyance is so taken without the knowledge or assent of the party whose money is so used, and excepting also the trust in favor of creditors.

I concur in the views expressed in the court below, and do not deem it necessary to add anything further thereto.

Judgment affirmed.

JOHN M'KEON, Respondent, v. ROBERT L. TILLOTSON Appellant.

In the treaties on the part of Ogden and Fellows with the Seneca and also with the Tuscarora nations of Indians, made in the presence of commissioners on the part of the state of Massachusetts, and commissioners on the part of the United States, for the purpose, on the part of said Ogden and Fellows, of purchasing from said nations their respective pre-emption right to their respective reservations in this state, the United States assumed no obligations, and undertook the performance of no duties, in respect to the said Ogden and Fellows, in their purchase of said reservations.

Neither of said treaties contained any stipulations or agreements of anything to be done or performed in respect to said purchase, on the part of the United States.

DAVIES, J. This action is brought to foreclose a mortgage made and executed by the defendant to the plaintiff, bearing date the 1st day of March, 1856. The execution of the mortgage was admitted, and the defendant sets up various matters in avoidance of the mortgage, and to show that there is nothing due upon it. It is conceded that the mortgage was given to the plaintiff to secure a debt due by the defendant to the United States, and that the plaintiff is a mere naked trustee. The answer sets up that, in and prior to the year 1838, there was an association of persons, of whom the defendant was one, who were the owners of the pre-emption title to certain lands in the western part of this State, then occupied by the Seneca nation of Indians, and known as the Buffalo Creek reservation, the Tonawanda reservation, the Cattaraugus reservation and the Allegany reservation, and that association had also the pre-emption title to another reservation, known as the Tuscarora reservation, then occupied by the Tuscarora nation of Indians. That the interest of the defendant therein was one twentieth; that the legal title to said lands was in Thomas L. Ogden and Joseph Fellows, as surviving trustees for the said shareholders, subject to the Indian right of occupancy. That on or about the 15th January, 1838, a treaty was made between the United States and the said Seneca and Tuscarora nations of

Indians, by which the said Indians agreed to remove from the State of New York to certain lands set apart for them by the government of the United States, in the territory west of the State of Missouri, in consideration of said lands so set apart for them, and of certain appropriations to be made by the government and applied under the direction of the president. That annexed to said treaty, and duly recognized and approved therein, was a deed of conveyance, bearing even date therewith, from the said Seneca nation, their chiefs and head men, duly assembled in council, and acting on behalf of said nation, to the said Ogden and Fellows, conveying to them the said four reservations in consideration of the sum of $200,000. That annexed to said treaty, and also duly recognized and affirmed therein, was another deed of conveyance bearing even date with said treaty between the sachems and chiefs of said Tuscarora Indians, conveying to said Ogden and Fellows, in consideration of $9,600, the said tract of land known as the Tuscarora reservation.

That by the terms of the treaty and of said conveyances, the said Ogden and Fellows, as trustees for said pre-emption owners, were entitled to the immediate possession of the said several tracts of land. That said treaty was duly ratified by the senate of the United States, and duly approved and proclaimed by the president on the 4th of April, 1840. That said treaty contained no provision as to the mode or manner in which the removal of the Indians, or the surrender of said reservation should take place. The answer further states, that prior to the year 1840, the United States had commenced an action, against the defendant, as surety on a bond for Samuel L. Gouverneur, then late postmaster of the city of New York; that a trial was had in the action which resulted in a verdict for defendant. That Mr. Butler, then United States district attorney, threatened an appeal, and that as a compromise of any claim which the United States had against the defendant upon said lands, as well as to settle the matter in controversy, the defendant agreed to execute to said Butler, for the benefit of the United States,

a mortgage upon his individual interest, in the land in said Indian reservations. That said mortgage was dated July 18, 1840, and was given to secure the payment of a. bond bearing even date therewith, conditioned to pay the sum of $10,207.80, with interest, at the rate of seven per cent, and the defendant avers in his answer, that said mortgage was executed upon the express understanding and assumption, on his part, that the mortgage debt thereby secured should be paid from the proceeds of the lands thereby assigned and released under said treaty, and that the government of the United States, would in good faith execute the provisions of the said treaty, and give the pre-emption owners of the said reservation lands possession thereof.

That said bond and mortgage was taken by said Butler, as trustee for the United States, and that he paid nothing on account thereof and had no personal interest therein. He avers that said treaty was not executed by the government of the United States, that said Indians refused to give possession of the lands ceded by them under said treaty and released and conveyed by said deeds, and that said government, although requested to carry into effect the provisions of said treaty, refused so to do. That in 1841 Ogden, as general trustee, with the view of obtaining possession of said lands, applied to John Bell, Esq., then secretary of war, for an execution of said treaty, stating to him that said pre-emption owners were prepared to pay the consideration money for said lands, provided a surrender of said lands by the Indians should be made. That said Bell replied that the government would do nothing, and that said owners must get possession of said lands through the instrumentality of the courts. That subsequently another application was made to John C. Spencer, Esq., then secretary of war, who also declined executing said treaty, and giving possession to said pre-emption owners of said lands, unless they would consent to re-convey said Cattaraugus and Allegany reservations. That in consequence of the refusal of said Indians to surrender possession of said lands, and the refusal of the government of the United States to execute said treaty, the said pre-emption own-

ers did not receive possession under the same of any part of said lands. That on the 20th of May, 1842, a new treaty was made by and between the government of the United States and the Seneca nation, which, after referring to the treaty of 1838, and the deed of conveyance to Ogden and Fellows, and to the differences which had arisen between the parties, declared in the first article, that Ogden and Fellows, in consideration of the releases and agreements mentioned, stipulated that the Seneca nation might continue in the enjoyment of the Cattaraugus and Allegany reservations, the same as before the conveyance, and in the second article, the Seneca nation agreed to release and confirm to Ogden and Fellows, the two remaining reservations, the Buffalo Creek and the Tonawanda. The third article provides for reducing the amount of the purchase so as to correspond with the relative value of the two reservations released to the value of the former fixed in the treaty of 1838. The fourth article provides for the appraisal of the lands and in the two reservations then confirmed to Ogden and Fellows, and to report the proceedings to the secretary of war and to Ogden and Fellows, one appraiser to be appointed by each. The fifth article provides that the possession of the two tracts then confirmed should be surrendered up to Ogden and Fellows, as follows: The unimproved lands, within one month after the report of the appraisers should be filed with the secretary of war, and the improved lands within two years after the filing of said report, provided that the amount of the value of said improvements should be paid at the time of such surrender to the president of the United States, and the consideration of said release and conveyance of said lands should, at the time of the surrender thereof, be paid or secured to the satisfaction of the secretary of war. The seventh article provides that the modifications in the treaty of 1842, should be a substitute for that of 1838 and to that extent should be deemed to repeal it. That said treaty contained no provision as to the mode or manner of the removal of said Indians, or the surrender of the reservations. That said treaty was duly ratified by the senate of the United States, and approved and proclaimed by

the president on the 26th day of August, 1842. The defendant further alleged that in consequence of the refusal of the government of the United States to execute the treaty of 1838, the pre-emption owners were obliged to submit to the propositions contained in the treaty of 1842, and that in consequence thereof, they lost the right to the possession of the Cattaraugus and Allegany reservations, which had been conveyed to them by the deed of 1838, and the possession of which was fully guaranteed to them by the government of the United States by the treaty of 1838. That under the provisions of the treaty of 1842 the award of the appraisers, therein provided for, was filed in the war department on the first day of April, 1844, and the amount awarded to be paid by said pre-emption owners was paid to the secretary of war for the benefit of said Indians in the year 1844, and the defendant paid his proportion, amounting to the sum of $6,688.04. The defendant avers that the treaty of 1842 has not been executed by the government of the United States; that said pre-emption owners have applied to the government to execute the treaty and to remove said Indians from said lands, and to give said pre-emption owners possession thereof, but that said government has refused so to do; that said Seneca nation have refused to surrender the possession of the Tonawanda reservation, but still retain possession of the same.

That in the years 1844, 1845 and 1846, the said owners, without any aid from the government of the United States, obtained by degrees the surrender of the lands in the Buffalo reservation, and the same was not finally made until the year 1846. That such possession was obtained at a large expense, and the delay in acquiring the same, subjected the defendant and the other owners to large expense and great pecuniary loss. That the proportion of the value of the Tonawanda reservation greatly exceeded in value that of the Buffalo Creek, owing to the superior value of the lands. That the mortgage, given to said Butler, was subject to prior liens upon the interest of said defendant in said lands. That all the lands, belonging to the share of this defendent, in the Buffalo Creek reservation, have been sold by the trus-

tees, and that the proceeds of such sales have been applied to the payment of said prior liens, with the exception of the amount paid on said mortgage to said Butler, and that the defendant had received nothing therefrom over and above such payments. The defendant then sets forth a payment, in March 1845, of $7,000, on account of said bond and mortgage, in February, 1846, a like payment of $2,000, and, in July, 1847, a further and like payment of $1,000. That said mortgage to said Butler, being a lien on the interest of said defendant, in the lands of Buffalo reservation, and it being necessary, on the sale of said lands, to make a clear and free title thereto, an arrangement was made between the defendant and the United States, by which the latter agreed to cancel the mortgage to said Butler, upon the defendant executing and delivering the mortgage, mentioned in the complaint in this action, as, and for the balance due on said mortgage to said Butler, and which was ascertained to be on the first day of March, 1856, the date of said bond and mortgage, the sum of $7,446.04, and that on the third of September, 1856, the defendant paid, on account thereof, the sum of $1,175. The answer alleges that as the defendant has paid, on account of said indebtedness, the sum of $11,175, a sum greater than the original principal named in said mortgage to said Butler, he has paid the whole principal of said debt, and that the sum now claimed as due on said mortgage is for interest thereon.

The defendant alleges that said pre-emption owners had no means of enforcing the provisions of said treaties; that they could not obtain the possession of said lands by legal proceedings in the courts; that the United States government, by becoming parties to said treaties, guaranteed to said pre-emption owners the possession of said lands so conveyed by said Indians, and that the omission to give such possession by the government was a fraud upon the rights of this defendant. That in consequence of the making of said treaties, and of the undertaking of the government to enforce the execution thereof, the said pre-emption owners have paid large sums of money for the consideration of said lands, and

have lost the interest on the same; that the sum paid to the government, in 1844, on account of said Tonawanda reservation has remained in the hands of the government ever since, and it has deprived the defendant of the use and enjoyment thereof. The defendant alleges that by the refusal of the government to execute said treaty of 1838 he had sustained a loss for interest alone, upon his proportion of the lands of the Buffalo Creek and Tonawanda reservations of not less than ten thousand dollars. That in consequence of the said pre-emption owners being compelled to submit to the provisions of the treaty of 1842, and thereby losing the possession of said Buffalo Creek and Tonawanda reservations, this defendant has sustained a loss in all of not less than $30,000. Thus the government, by wrongfully and fraudulently omitting and refusing to perform the duty which they were legally bound to perform, in giving to the said pre-emption owners the possession of said lands, have deprived the defendant of the means of paying the interest of said mortgage debt from the lands specifically assigned for the payment of the same, and that as a matter of equity, and inasmuch as the original mortgage debt has been fully paid, the defendant claims that he should not be compelled to pay interest upon said debt, said interest having accumulated solely in consequence of the neglect and refusal of said government to execute said treaties, which neglect and refusal, it is alleged, were a fraud upon the rights of the defendant. The defendant claims and insists that the sum of money paid by him to obtain possession of the lands of the Buffalo Creek reservation, and the interest upon his proportion of the purchase and improvement moneys of the Tonawanda reservation, deposited with the secretary of war in 1844, should be allowed to him as a credit upon the sum claimed to be due on said mortgage; and he insists that said mortgage debt should be adjudged to be fully paid, and that said bond and mortgage should be given up and canceled. By stipulation between the parties it was agreed, in order to save a reference to compute the amount due upon said bond

and mortgage, that the apparent amount due thereon on the 16th of December, 1858, was $7,581.87.

The judge at Special Term gave judgment for the plaintiff, on account of the frivolousness of the answer, and ordered and directed, that a foreclosure and sale of the mortgaged premises should take place, to satisfy the amount agreed to be due thereon, and which judgment was affirmed at the general term of the second district, and the defendant now appeals to this court.

The matters stated in this answer are not set up as a counterclaim on the part of the defendant. They do not fall within the provisions of section 150 of the Code. They do not arise out of contract, or from any transaction set forth in the complaint on the foundation of the plaintiff's claim, connected with the subject of the action.

The subject of the action is the collection of a debt, admitted by the defendant, at the time of the execution of the bond and mortgage, to be due by him, to the United States and to secure which, this mortgage was given. That debt was originally secured by a mortgage upon other lands. In 1840, the defendant admitted his liability to the United States, to pay the sum mentioned in his bond and mortgage to Mr. Butler. It is of no moment, whether such indebtedness arose upon his liability as surety upon a bond or otherwise. It was a conceded indebtedness, and its justice has been admitted by the subsequent payments. In 1840, when the first mortgage had been given, the Indians had not removed from the reservation as the defendant now contends they should have done, in conformity with the treaty of 1838, and if there was any neglect of duty on the part of the United States, it had occurred at that time. Yet the defendant, setting up no such claim in discharge of his indebtedness to the United States government, gave a mortgage on his interest in the lands of the five reservations, to secure the whole amount of such indebtedness, and such mortgage remained a lien upon his interest in the lands of the said five reservations, until the United States, upon the application of the defendant, in 1856, released such lien, and canceled said mortgage, and took the

mortgage now in process of foreclosure in this action, upon other lands of the defendant, for the balance due of said original debt. And it is a significant fact, that at the time this new security was given, all the transactions mentioned and referred to, in the defendant's answer had happened and all the equities now interposed by him, if any, existed and yet no mention seems then to have been made of them, and no claim set up that the debt mentioned in the new bond and mortgage was not due. The giving of that bond and mortgage, was an act entirely inconsistent with the allegation now made, that at that time there was nothing due to the United States by the defendant. No cause of action is set up by this answer, against the United States, and the equities claimed by the defendant will next be considered, as well as the affirmative relief asked for, namely, that the mortgage debt be adjudged to be fully paid, and that the bond and mortgage should be given up and canceled.

The gravamen of the defendant's answer is, that the United States was bound by the terms of the treaty of 1838, to remove the Indians from the five reservations then conveyed to Ogden and Fellows, and that in consequence of such neglect and refusal the defendant had sustained damages greater than the balance due upon said original bond and mortgage. The duty of the United States thus to remove the Indians is stated in various forms in the answer. In one place it is alleged, that by the terms of the treaty of 1838, and by the conveyances to Ogden and Fellows, they were entitled to the immediate possession of said lands. Again, that the possession of said land to the defendant and his ten owners was fully guaranteed by the United States by the treaty of 1838. Again, it is alleged, that the United States, by becoming parties to the treaties of 1838 and 1842, guaranteed to the said pre-emption owners the possession of said lands; and again, that in consequence of the undertaking of the government to enforce said treaties, and its neglect and refusal so to do, the defendant had lost the interest on the moneys paid to the government, and the large sums paid to obtain the possession of said lands. These are the various

forms in which the defendant states the duty, obligation, agreement or guaranty of the United States, the failure to perform which, creates the equitable defense contended for. There is no pretense that any such duty is recognized or referred to in either of the bonds and mortgages executed by the defendant to the agents of the United States, or that any agreement or understanding was ever had or existed between the defendant and the United States, or any of its officers or agents, that any such duty existed, or that the United States would undertake its performance. The nearest approach to this is the allegation in the answer that the mortgage to Butler was executed upon the express understanding and assumption *on his part* that the government of the United States would in good faith execute the provisions of the treaty of 1838, and give to the pre-emption owners the possession of the said reservation lands. This allegation falls far short of any understanding or agreement on the part of the United States to do the things specified, made or entered into at the time of the execution of the mortgage.

The word "express" as here used might seem to imply that an expression had been given to some understanding on the part of both parties at the time, but the other words used, negative any such inference. It was an understanding or assumption on the part of the defendant, not only that the United States would execute the treaty of 1838, and put the owners of the lands conveyed by the Indians into the possession thereof. The form of the allegation is evidently intended to convey the idea, that the United States were bound by the terms of the treaty of 1838, to put the defendant and his associates into the possession of the Indian lands. The same idea, as has been observed, is presented in different language several times, in the answer, and in one instance as though the United States by that treaty fully guaranteed such possession to them. The political and judicial history of the country, and the statutes of the State of New York and Massachusetts show, that at an early day a dispute had arisen between the two States, in respect to the title to a large tract

of land within the territorial limits of the State of New York, of which the Indian reservation mentioned and referred to in the defendant's answer formed a part. In 1786 the dispute was amicably settled by a cession from Massachusetts to New York of the sovereignty and jurisdiction over the tract then occupied by the nations of Indians mentioned, and by a cession from New York to Massachusetts of the right of pre-emption to the soil from the Indians. The lands were then in the independent occupancy of the Seneca nation and the Tuscarora nation, and owned by them, and Massachusetts acquired by the cession the exclusive right of purchasing their title to said lands whenever they became disposed to sell the same. This right became vested in the said Ogden and Fellows by proper conveyances from the State of Massachusetts. By the constitution of the United States the power to regulate commerce with the Indian tribes, was vested in congress, and by virtue of that power, congress has passed various laws regulating intercourse with the Indian tribes. Negotiations with them, must be had by and with the assent and under the authority of the United States. They are treated as a *quasi* nation possessing none of the attributes of an independent people, and are to be dealt with accordingly.

The Indian tribes are in a state of pupilage toward the United States government, and hold the relation to it which a ward owes to his guardian. (*Fellows* v. *Blacksmith*, 19 How. U. S., 366.) In 1838 Ogden and Fellows being desirous of purchasing the pre-emption right of the Seneca nation to the four mortgaged reservations, and from the Tuscaroras the reservation owned by them, procured the appointment of commissioners on the part of the State of Massachusets, and on the part of the United States, to hold a treaty with said nations, and which was held on the 15th of January, 1838, and which treaty was approved of, and proclaimed by the president of the United States the 4th day of April, 1840. By the terms of this treaty these commissoners being present, the chiefs of the Seneca nation agreed to sell, and Ogden and Fellows agreed to purchase, the title of the nation to

said four reservations, and a deed therefor, having been first read and explained to said Indians, was made and executed by them, bearing date January 15th, 1838, whereby, for the consideration of $202,000 therein expressed, to them in hand paid, they granted, bargained, sold, released and confirmed unto said Ogden and Fellows, and to their heirs and assigns, the said four reservations, to have and to hold the same, to them, their heirs and assigns forever, as joint tenants and not as tenants in common, and the commissioner on the part of the State of Massachusetts, and the commissioner on the part of the United States, certified and declared at the foot thereof that they respectively approved of the same. A similar treaty in all respects, containing a similar deed from the Tuscarora nation to Ogden and Fellows, for their reservation, was made and concluded at the same time, and certified and approved by the said commissioners in the same manner. Neither of these treaties contained any stipulations or agreements of anything to be done or performed on the part of the United States. All that was done on the part of the agent of the United States, was to certify and declare that the said deed then executed in his presence, being fairly and perfectly understood by the said Indians, and that he approved of the same.

There is not a word in either of these treaties in reference to the possession of said reservations, or anything implying that the United States was to deliver the same to the grantees named in the conveyances recited therein, or assumed any obligations or duties in relation thereto. These were the only treaties made at that time to which Ogden and Fellows could in any sense be deemed parties, or had any right or pretense to assert any interest in the fulfillment of. At the same time, to wit, on the 15th January, 1838, a treaty was made between the United States and several tribes of New York Indians, including the said Seneca and Tuscarora nations, and which was amended by the Senate of the United States on the 11th June, 1838, concerning the removal of said tribes to certain lands west of the State of Missouri, and lands owned by them in the western States. Article 10

of said treaty related exclusively to said Seneca nation. By this article the said Seneca nation agreed with the United States to remove to their new home in the west within five years, and to continue to reside there. The said article then recites that at the time of making said treaty, Ogden and Fellows had purchased from the Seneca nation the right and title of said nation to certain lands in the deed of conveyance annexed to the treaty mentioned, for the price of $202,000; the treaty then declares that the nation agreed that said sum should be paid to the United States, which agreed to receive the sum, to be disposed of as follows: The sum of $100,000 to be invested in safe stocks, and the increase thereof was to be paid to said Indians annually at their new homes, and the sum of $102,000 was to be paid to the owners of the improvements on said lands, according to an appraisment to be made, on said Indians severally relinquishing their respective possessions to said Ogden and Fellows. Article 14 of said treaty related to the Tuscarora nation, and by it said nation agreed to accept the country set apart for them in the Indian Territory and to remove there within five years and continue to reside there. It is recited that at the making of that treaty, Ogden and Fellows had purchased all the right, title and claim of said nation in and to the lands mentioned in the deed annexed. That the consideration of said lands had been secured by said Ogden and Fellows to their satisfaction, therefore the United States assented to said sale and conveyance and sanctioned the same.

It is difficult to perceive from these references to the provisions of these treaties—and they are all, which relate to said nation of Indians, or the lands sold and conveyed by them to said Ogden and Fellows—any grounds for the claims and equities set up by the defendant in his answer against the United States. It is very clear that the United States made no agreement whatever with Ogden and Fellows, or with the defendant, or that by reason of anything contained in those treaties that government owed to them, or either of them, any duty whatever. If there has been any breach of duty, or violation of contract on the part

of the United States, it has been with these tribes of Indians, and not with Ogden and Fellows, or with their associates. A reference to the circumstances under which the treaty of 1842 was negotiated, and to its provisions, will furnish as little color for the claims set up by the defendant. This treaty is between the United States of America and the Seneca nation of Indians, and was made on the 20th day of May, 1842, and approved and proclaimed by the president on the 26th day of August, 1842. It recites the making of the treaty of 1838, proclaimed to have been duly ratified on the 4th of April, 1840, and that on the date of that treaty, May 20, 1842, an indenture had been made and executed by and between the Seneca nation and said Ogden and Fellows, in the presence of and with the approbation of a commissioner on the part of the United States, and in the presence of and with the approbation of a commissioner on the part of the State of Massachusetts; which indenture is set forth in full, and recites the indenture between the same parties of January 15, 1838; and that divers questions had arisen between the chiefs of said nation and said Ogden and Fellows; and that the provisions contained in said indenture remain unexecuted; and that said parties have mutually agreed to settle, compromise, and finally terminate all such questions and differences on the terms and conditions therein specified; among which are, that the said nation, notwithstanding the indenture of January 15, 1838, might continue in the occupation and enjoyment of the whole of said two reservations, the Cattaraugus and the Allegany, with the same right and title in all things which they had immediately preceding its execution. In consideration whereof and of the agreements therein contained, the said nation released and confirmed unto said Ogden and Fellows the said Buffalo and Tonawanda reservations. The indenture contained other provisions not necessary particularly to mention, except those of article fifth, which were, that the possession of the two reservations thereby confirmed to Ogden and Fellows, were to be surrendered and delivered up to them, as follows: the unimproved lands within one month

after the filing of the report of arbitrators, as provided for therein, and the improved lands within two years after the said report should have been filed. The seventh article provided, that that indenture should be in lieu of and as a substitute for that of January 15, 1838.

The United States, taking into consideration the premises, stipulated and agreed with the said Seneca nation: 1. That the United States consented to the several articles and stipulations contained in said indenture between said nation and said Ogden and Fellows; 2. The United States further consented and agreed, that any number of said nation who should remove from the State of New York, under the provisions of the treaty of April 4, 1840, should be entitled, in proportion to their relative numbers, to all the benefits of said treaty; 3. The United States further consented and agreed, that the 10th article of said last mentioned treaty should be deemed to be modified in conformity with the provisions of said indenture of May 20th, 1842, so far as that the United States would receive and pay the sum stipulated to be paid as the consideration money of the improvements therein specified, and would receive, hold and apply the sum to be paid, and the securities to be given for the lands therein mentioned, as provided for in such indenture.

These are all the stipulations, agreements or undertakings contained in said treaty, on the part of the United States, or affecting that government. It is seen that they are made only with the Indians, and that they are the only parties thereto. The provisions fall far short of establishing the propositions contained in the defendant's answer, in reference to the duty of the United States to remove said Indians, to give the possession of their lands to the defendant and his associates, or that thereby the United States guaranteed such possession to the defendant. As these treaties are referred to and made part of the defendant's answer, as the foundation of his claim against the United States, they have received a careful examination and dissection for the purpose of ascertaining what duties or obligations arise therefrom, on the part of the United States, to the defendant. It is diffi-

cult to perceive what obligations the United States incurred by these treaties, for the violation of which the defendant has any claim for damages. As well might that claim be interposed by any other citizen of the United States, and as well might any other debtor to that government, claim that his debt was discharged, and satisfied by the failure of the United States to fulfill its treaty stipulations with the Indians. The United States, therefore, assumed no duty to the defendant, in reference to the removal of the Indians from their lands, conveyed to Ogden and Fellows, or to put the defendant or his associates into the possession thereof, and consequently no claim for damages can exist on the part of the defendant against the United States, for the omission to discharge a duty or obligation which never had an existence.

It is further alleged that the defendant and his associates were greatly damaged by reason of their being compelled to accede to the terms of the treaty of 1842. That treaty was made by the United States with the Seneca nation, and when duly ratified and proclaimed, became the supreme law of the land, binding upon the defendant and all other citizens. But it is manifest that it is not the terms of the treaty of 1842, that the defendant complains, but of the provisions of the indenture made by and between Ogden and Fellows and the Seneca nation, to which the United States assented by that treaty. The United States were not parties to that indenture, and assumed no obligation in reference to it, to the defendant. It was an arrangement between the defendant and his associates represented by Ogden and Fellows, and the Indians and it is to be presumed they would not have entered into it if they had not deemed it for their interest so to do. The recitals declare the reasons why it was made, that questions and differences had arisen between the Indians and Ogden and Fellows, in relation to the indenture of January 15, 1838, not to any differences which had arisen between either of the parties thereto and the United States. It also recited that the provisions of said indenture, remained unexecuted. We have seen that the only parties

thereto were the Indians, and the said Ogden and Fellows, and this recital is to be understood that the same remained unexecuted by them. But what is conclusive upon the terms here set up by this defendant, is that said indenture declares that the parties thereto have mutually agreed to settle, compromise and finally terminate all such questions and differences on the terms and conditions thereinafter specified. Now this compromise was binding and conclusive upon the parties thereto, unless impeached for fraud or mistake. Even if the United States had been a party thereto, they could have set up its finality as it is not impeached for the reasons suggested. It has been performed, on the part of the Indian nations, by the surrender of the two reservations, the possession of which it was agreed thereby should be given to Ogden and Fellows, and all claim for damages, if any, existed against the Indians for not surrendering the possession of the reservations, as it is claimed they were bound to do under the indenture of January 15, 1838, must be deemed to be settled and compromised by the new agreement made in 1842.

It remains to be considered, what equities, if any, does the defendant present, arising out of the treaty of 1842. That treaty ratified on the part of the United States the indenture made between the Indians and Ogden and Fellows of May 20th, 1842. It provided for a valuation by appraisers of the improvements which had been made by the Indians upon the lands of the two reservations, the possession of which it was thereby agreed should be surrendered, and for the payment of the amount awarded by the appraisers to the secretary of war, for the benefit of the Indians. This award was made and the money paid in 1844. Still the Indians did not remove from the Buffalo Creek reservations until the year 1846, and had not removed from the Tonawanda reservation, as they had agreed to do, by the terms of the indenture of 1842; and the defendant claims that the United States did not execute that treaty, and remove the Indians. We have already adverted to this claim, and shown how untenable it is. In 1844, 1845, and 1846 the pre-emption owners themselves, induced the Indians to remove from the lands of the

Buffalo Creek reservation, and obtained the possession of it. The lands, or interest of the defendant therein, thus became marketable, and were accordingly sold, from time to time, by the trustees, or Mr. Fellows the survivor. The share of the defendant, in this and the other reservations, was subject to other liens, prior to that created by the mortgage to Mr. Butler, and the proceeds of the sale of his interest in the lands of the Buffalo reservation were entirely exhausted in the discharge of these liens. The mortgage, therefore, remained a lien on his interest in the lands of the other reservations. The defendant, during the years 1845, 1846 and 1847, was making payments upon his bond and mortgage. He had paid, in all, the sum of ten thousand dollars, which was applied in discharge of the payment of the principal and interest due thereon. In 1855 the defendant was desirous of procuring a discharge of said mortgage, thereby releasing not only his interest in the lands of the Buffalo reservation, but in those of the other four reservations, and applied to the government to make some arrangement for that purpose.

He then proposed to give his bond and a mortgage upon other lands of his in the county of Dutchess for the balance then due on said mortgage, and which he admitted was, on the 1st of March, 1855, the sum of $7,446.04. Upon that application the arrangement was made by which the mortgage then held by Mr. Butler was canceled, and the present mortgage accepted as a substitute therefor. Since its execution the defendant has made payments thereon already adverted to. One of the equities insisted upon by the defendant is, that the failure of the government to put the defendant in the possession of the lands of the Indian reservations has deprived him of the means of paying the interest on said lands, and this equity is connected with or arises from the allegation of the answer, that such lands were specifically assigned for the payment of such interest. It is only necessary to say that it is impossible to discover from the facts set forth in the answer, any grounds for such a position. It is doubtless true, as the defendant alleges, that the mortgage was executed upon the express understanding

and assumption *on his part*, that the mortgage debt thereby secured should be paid from the proceeds of the lands thereby assigned and released under said treaty. It is not pretended that there is any other foundation for this assumption than is found in the fact that said lands were mortgaged by the defendant to the United States to secure his indebtedness. It was an understanding and assumption on his part only, and it is not claimed that it was so understood on the part of the United States, unless the use of the word "expects" was intended to convey that meaning. That it does not, has been shown, when the force of that word, as used here, was commented on in another connection. But by the terms of the indenture of 1842, assented to by the United States, the possession of two of the reservations covered by said mortgage, was released to the Indians, and in 1846 the possession of the Buffalo Creek reservation was fully obtained by the defendant and his associates. The United States, by the arrangement of 1855, fully discharged all the Indian lands from the lien of said mortgate, at which time the defendant conceded that there was a balance due to them. It is no fault of the United States if the defendant has not since then had the full enjoyment of what they then released to him. The defendant has thus had the benefit and enjoyment of the lands mortgaged, and not the mortgagee. There is no equity therefore in the claim that interest should not accrue upon the mortgaged debt.

It is also insisted that the amount contributed by the defendant, to obtain possession of the Buffalo Creek reservation, should be set off or credited upon said mortgage, and that defendant should also be credited with his proportion of the interest on the amount paid by him to the secretary of war, under the award, made pursuant to the indenture of 1842, to pay for the Indian improvements.

The first of these claims has been already disposed of, by showing that the United States were under no obligation to the defendant by way of contract, or otherwise, to remove the Indians from their lands and put the defendant in possession thereof. If there had been, then there would have been

force in the claim that the defendant should be allowed the amount of money expended by him, for doing what it was the duty of the United States to do. Under the facts stated, the expenditure incurred by the defendant must be regarded as made on his own account and for his own benefit, and which the United States is under no obligation, legal or equitable to re-imburse to him. In reference to the second claim, it is only necessary to observe that the moneys paid to the secretary of war, pursuant to the provisions of the indenture of 1842, were paid to him as the trustee for the respective Indian owners of the improvements thus compensated for. Such moneys belonged to said Indians, and if any interest accrued thereon while the same was in the hands of their trustee, or he was chargeable with any such interest, it belonged to the owner of the principal, and was to be paid to him. As was well observed in the opinion of the Supreme Court in this case: "The defendant and his associates were under a strict legal obligation to pay this money, and the government derived no benefit from it. If any rights accrue to the defendant, in consequence of this payment, they must be asserted against the Indians, for the transaction was one between them and the white purchasers exclusively."

It follows from these views and considerations, that there is nothing set up in the defendant's answer which presents a legal or equitable defense to the foreclosure and sale of the mortgaged premises, or which in any way modifies or alters the contract between the parties thereto. The judgments of the Special and General Terms were, therefore, correct, and should be affirmed.

All the judges concurring,

Judgment affirmed.

CHARLES SCHOOP v. GEORGE L. CLARKE *et al.*, Executors of James Chappell and Joseph L. Chappell.

It is essential to the defense of usury, that there should be a corrupt agreement between the parties to the loan, that the lender shall have secured to him a greater rate of interest than that allowed by statute.

Where a note or bill is made for a larger amount than the party discounting it expected to advance, and it is agreed that the paper shall be negotiated for the security of the amount advanced only, the transaction is not usurious.

It is no variance to count upon the note or bill, and to prove on trial, to rebut the defense of usury, that only a part of the face of the note is demanded.

APPEAL from a judgment of the Supreme Court. The action was upon a promissory note by an indorsee against the maker and indorser. It was made by the defendant, Joseph L. Chappell, to the order of the original defendant, James Chappell, whose executors have been made defendants in his stead, and was dated September 29, 1857, and was for the payment of $265 in two months from date, at a bank. The defense was usury.

It was proved that it was made and was indorsed by James Chappell for the accommodation of Nathan L. Chappell, who is the brother of the maker and the first indorser, and was placed in the hands of Nathan to raise money upon for his use. It was first negotiated to James Ray and Amos Ray, under whom the plaintiff claims as indorsee. They advanced to Nathan L. Chappell, in a few days after the date, the sum of $250. The defendants claimed that the difference between this sum and the amount of the note—$15—was an usurious premium. Nathan L. Chappell testified, as a witness for the defendants, that he sold the note to the Rays for $250, the business being transacted between him and James Ray; and he denied any recollection of any other amount. James Ray was examined on behalf of the plaintiff, and testified, in substance, that the maker and first indorser resided at Rochester, and that he and Amos Ray, and also Nathan L. Chappell, resided at, or in the immediate vicinity of Buffalo;

that a few days after the date of the note N. L. Chappell came to him, bringing it with him, and said that his brother, James, the first indorser, had written him to come and see him, the witness, and stated that it would be a great accommodation to him, James Chappell, if the witness would let him have some money; that the witness replied that he would be glad to accommodate said James; that said James held a mortgage against him for $6,000, upon which an installment of $1,800 would be payable the ensuing spring, and expressed some apprehension that he should not be able to pay it; that said Nathan remarked that his said brother thought that the witness might be laying up money to meet his spring payment, with which he could accommodate him, said Nathan; that the witness inquired how much money said Nathan wanted to get, to which the brother replied, after making figures with a pencil, that he could get along with $250, but must have that sum; that his brother, said James, would show him no mercy as a creditor if he thought he could accommodate him, said Nathan, and would not do it, but if he did accommodate him he would be very indulgent. The witness stated that the conversation was continued the next day, when he inquired of said Nathan why he did not bring an order for the money from said James, to which he replied that he did not know whether he had the money; that the note would stand as good as an order, and that the $15, which the note exceeded the $250, could be arranged the next spring, when the witness would make the payment on the mortgage; that the witness thereupon let him have the $250 and took from him the note, he indorsing it. The witness could not state that said Nathan said in terms that the money advanced would be allowed on the mortgage, but that such was the substance of the conversation as he understood it. The witness positively denied that he was to have the $15 for advancing the money. He said he did not buy the note, but took it by way of voucher for the amount advanced. The aforesaid evidence of James Ray was received against the objection of the defendants, who excepted to the ruling.

The defendants claimed to have the jury instructed to render a verdict for the defendants, and excepted to the ruling by which that instruction was refused.

The judge charged that the note first had an inception when negotiated by Nathan L. Chappell, and if it was sold or discounted at a discount of $15, it was usurious. But he further charged that "if they found from the evidence that the arrangement between Chappell and Ray was that Ray should discount the note in part, and to the extent of $250, by advancing that amount upon it, with the understanding that the note should be held for that sum and interest thereon only, and should be allowed on the mortgage in the spring at $250 and interest thereon only, without any benefit or interest in Ray in the excess beyond that sum, the transaction would be a valid one, and in legal effect it would be the same as if the note had been reduced by indorsement to $250 and interest, and then transferred for that sum, and in such case the plaintiff would be entitled to recover to the amount of $250 and interest thereon." The defendants' counsel objected to this instruction, claiming that there was no evidence on which to base it and that it suggested an unauthorized departure from the case made by the complaint, which counted for the whole amount of the note, and not for an advance of a portion of that sum.

The verdict was for the plaintiff for $250 and interest; and the judgment was affirmed at a General Term. The defendants thereupon appealed here.

The case was submitted here on printed arguments.

George F. Danforth, for the appellants.

John C. Strong, for the respondent.

DENIO, Ch., J. It is essential to the defense of usury that there should have been a corrupt agreement between the parties to the loan, that the lender should have secured to him a greater rate of interest than that allowed by the statute. It is not of course necessary that such an agreement should be expressed in terms. If such is the effect of the transaction

into which the parties enter, it is an usurious contract. If N. L. Chappell, in the case before us, had negotiated the note, on which the action is brought, to the Rays for an amount less than its amount with legal interest, without anything to qualify the transaction, the difference between the money payable by its terms, and the sum advanced by the purchaser, would have been an usurious premium, because there would have been nothing else to which the excess could have been referred. But if Chappell, having the note in his possession, with authority to negotiate it in a lawful way, had negotiated for a sum less than its amount, taking from the lenders an explicit agreement that they were not to hold it or claim, or collect, by means of it, a larger amount than that which they had advanced with lawful interest, there would have been no usury in the transaction, for the reason that there would have been no corrupt agreement. It is quite usual for notes and mortgages to be drawn, dated and executed preparatory to a loan, and providing for the payment of interest from their date, and afterward made operative by delivery and the advancing the amount of the principal sum mentioned in them. In such cases an amount would, *prima facie*, be secured to the lender greater than the sum loaned and the legal interest, and the securities would be liable to the charge of usury; but if it could be shown that such was not the intention, but, on the contrary that it had been expressly agreed between the parties, that interest should be payable only from the time the money was advanced, the defense of usury would be repelled. It very frequently happens that notes and bills prepared for the purpose of being discounted, are made for a larger amount than the bank or other party which is expected to be the lender is willing to advance. If in such case, it be agreed that only a part of the amount should be lent and that the paper should be negotiated for the security of that amount only, the transaction is not usurious. The convenience and safety of the parties would no doubt be promoted by a written statement annexed to the paper setting forth the actual state of the facts; and this is understood to be a very usual method in such cases.

But whether the evidence exists in such an authentic form, or is otherwise satisfactorily established, it is equally effectual to rebut the allegation of usury. In whichever way the fact is established, when satisfactorily shown it equally disproves the existence of a corrupt agreement between the lender and the borrower. It is surely unnecessary to refer to authorities to establish so plain a proposition. Several such are recited in the case of *Condit* v. *Baldwin* (21 N. Y., 209); and the principle is asserted or conceded both in the principal and dissenting opinions. The doctrine of the necessity of an actual corrupt agreement in order to predicate the vice of usury was there carried to an extent to which all the judges could not agree. But the general proposition that usury could be repelled by showing the absence of such a contract met the assent of all the members of the court.

I do not understand the counsel for the defendant to maintain the opposite of what has thus far been stated. His position is that if a note could be negotiated for a less amount than the sum stated in it, the arrangement would be a substituted agreement, and would require to be stated specially in the complaint. The complaint in this case takes no notice of the circumstance that the paper was held for less than the amount expressed in it, but is in the usual form adopted when the whole amount is sought to be recovered; and hence it is argued that the plaintiff ought not to have been permitted to answer the allegation of usury by proof of the special circumstances of the case; that in the absence of such proof the evidence of usury would be complete; and that upon such evidence being given, the plaintiffs' case was fatally variant from the one stated in the complaint. These objections are not in my opinion sound, though it may be admitted that they are specious. The note on its face contains no feature of which usury could be predicated. That was attempted to be made out by the parol evidence. There is nothing respecting interest, whether lawful or excessive, in it. The defendants made out by parol a *prima facie* case of usury; but this was subject to be met and disproved by the same species of evidence. As to the alleged variance, I do

not think the case could have presented any difficulty under the former more strict system of pleading. The contract set up in the complaint, and the one established by the evidence are identical. It is a promissory note, having a certain person as maker and certain others as indorsers, which was counted upon and which was proved by the evidence. Simply there was a circumstance brought out on the trial which showed that the plaintiff was not entitled to recover the whole sum of $265, but only $250 and the interest, except on the question of usury, it would have been for the interest of the defendants and it would have been their right to have themselves proved that circumstance, to reduce the recovery. It would not have established that the plaintiff was not the holder of the note, but only that he held it under such circumstances that he could not recover the whole amount but only so much as had been advanced when the note was first negotiated. But the defense of usury being set up, and supported by *prima facie* evidence, it became the interest of the plaintiff to show the peculiarity in the case, namely, the partial want of the consideration advanced upon its negotiation, in order to repel the presumption of usury. When this was once shown, it had the double effect of establishing that there was no usury in the contract, and that the note could not be lawfully enforced for an amount beyond that which was advanced and the interest. The giving of that evidence did not have the effect to substitute a parol contract for the written one contained in the note, but to establish a partial defense to the written contract.

The case of *Douglass* v. *Wilkinson* (6 Wend., 637), on which some reliance is placed, cannot aid the defendants. The payee of a note for $2,500 indorsed on the back of it over his signature these words, "Mr. Olcott, pay on within seven hundred and fifty dollars," and obtained that amount of money from the bank of which Mr. Olcott was the cashier. The plaintiff appears to have been indorsee of the bank. The question was whether the writing was a legal indorsement and transfer of the note, and it was held that it was not. This was partly on the ground that an entire

contract could not be divided. It was shown, moreover, by authority, that a bill could not be indorsed for a part only of its contents, *unless the residue had been extinguished.* The indorsement in the case before us was in the usual blank form, and did not purport to divide or split up the note, and transferred the whole note. The balance of the note beyond the amount advanced by the Rays was effectually extinguished. The general indorsement transferring, as it did, the whole contract, there was nothing remaining in the payee.

The case came up again after the declaration had been amended by setting out the note as one made for $750, and indorsed by the defendant, the payee, to the plaintiff. The facts were that the defendant, who indorsed for accommodation, had declined to indorse for the whole $2,500, and therefore indorsed specially, as has been mentioned, and it was discounted for the $750. The plaintiff was permitted to recover that amount upon that state of facts, and the recovery was sustained by the Supreme Court and by the Court for the Correction of Errors. (17 Wend., 431; 22 id., 559.) A remark of Mr. Justice BRONSON, in the course of the opinion of the Supreme Court, recognizes very distinctly the correctness of the view which I have taken of the present case. He says: "It is not unusual, I believe, to discount accommodation paper for a less sum than the nominal amount; and I am not aware that the right of a holder to treat it as a valid security against all the parties for the amount at which it was discounted has ever been questioned. I do not speak of a usurious discount, but of a transaction like the present one, where the note was received by the bank in the same manner as though it had been drawn for $750, and nothing more than the legal discount was charged upon that sum."

The testimony of James Ray, though it was to some extent disputed by N. L. Chappell, was sufficient to take the case to the jury. He said positively that the understanding was not that the Rays were to hold the note for the whole amount, so as to realize the $15 difference, but only for the amount which he and the other Ray advanced.

I am satisfied that the Supreme Court was right, and that the appeal was without substantial merits, and am for affirming the judgment appealed from.

HOGEBOOM, J. 1. The suit is on a note for $265, dated September 29th, 1857, at two months, drawn by Jos. L. Chappell, and indorsed by James and Nathan Chappell. This note was duly proved and protested, and plaintiff rested.

2. The defense was that it was an accommodation note, signed by Joseph and indorsed by James for the brother Nathan to raise money on, and that he procured it to be discounted by one James Ray (against whom James Chappell held a mortgage), at a usurious rate, to wit, for a premium of $15, when the note had less than two months to run. This defense was in substance proved by Nathan Chappell.

3. The plaintiff undertook to answer this defense by James Ray by proving that he did not discount the note for usury, nor take or reserve $15 out of the amount, but discounted it for $250, which he advanced and paid to Chappell, and held it, and was to hold it for that amount only expecting to apply it as so much toward the mortgage he owed the Chappells. This testimony was not objected to, on the ground that it differed from the pleadings.

4. The judge charged that if the transaction was a loan of $250 for that amount of money advanced, and the note was not to be held for any larger amount, and such was the understanding of the parties, the transaction was lawful, and the plaintiff could recover as upon a loan for that amount.

This charge was excepted to, first, as not being within the range of the fact; and second, as the action was brought upon the note as an entire contract to recover the whole amount, and not a portion of the note, but not specifically upon the ground that it was not within the issue of the pleadings.

5. I think the charge was correct, and was unexceptionable in point of law. There were also sufficient facts in the testimony of James Ray to jusitify its being submitted to the jury in that aspect of the case.

The defendant, it is true, objected that the note was for a *larger amount*, and that the plaintiff claimed to recover the whole, but that is not precisely the objection of variance. If it was, the judge would have had a right, I think, to conform the pleading to the facts proved, to disregard the variance, and to treat the pleadings as amended. That was a matter of discretion, and if he had in terms exercised such a power, I think its correction would have been beyond our reach.

It was still a note for $265 on its face, which Ray discounted, and it remained so, though the whole amount was not discounted upon it. It was *that note* which Ray discounted. When he received it there was not so much due upon it, and he discounted it for the lesser sum. The plaintiff erred in the amount he claimed to be due, but that is not material.

6. The judgment should be affirmed.

All the judges concurring,

Judgment affirmed.

WILLIAM HERRICK *et al.*, Executors, etc., *v.* ISAAC AMES *et al.*

Defendants cannot claim the opening of an alleged settlement on the ground of a mistake, without establishing affirmatively the existence of such mistake.

DENIO, Ch. J. The defendants purchased the goods of the plaintiffs' testator according to an inventory. Errors are found in the additions, extensions and footings in that inventory, by which the value of the goods was made to appear less by $2,478.58 than the inventory, if the items had been correctly entered and accurately footed, would have shown them. It is not denied but that this furnished a sufficient reason for opening the account, nor but that the settlement should be corrected accordingly and the plaintiffs be allowed in this action what was lost by means of the errors.

But the defendants contend that there was an error against them in entering the price of the goods without deduction in the accounts. About the time the inventory was completed, and before the transfer of the goods, a fire occurred in the store in which they were kept, by which they were damaged; and for this loss the plaintiffs received $12,898.23 from certain insurance companies which had issued policies thereon. The defendants paid or accounted for the goods according to the inventory, and they were entitled to the indemnity which the insurance companies had paid on such of them as had been burned. It appears by the evidence that the subject of accounting for these moneys had been discussed by the parties, and that the plaintiffs' testator claimed that the real loss of the goods was only about three thousand dollars. Whether this estimate was assented to by the defendants does not appear. The main point is whether anything on that account was allowed to the defendants. In order to enable the defendants to establish a claim on that account it must appear that, by some mistake, the proper allowance—whether $4,000 or $12,898.23—was omitted to be made. The evidence was by no means satisfactory. From the lapse of time and the ignorance of the witnesses,

the meaning of certain entries in the books could not be ascertained. The findings of the referee are equally unsatisfactory; he does not find distinctly whether an allowance for the insurance moneys was made or not, but we infer that it was either made or waived. He makes various extracts from the evidence, and concludes by saying that there is no express evidence of such allowance, or that an allowance on that account was waived; but he adds, "I find, as matter of law, that the evidence herein detailed is sufficient to sustain such inference of fact as above stated." The meaning of this is not clear to my mind. All that can be certainly said is, that the referee was unable to find that a mistake occurred in omitting to credit the insurance moneys. His opinion is evidently to the contrary of that.

Now, this question is to be determined as though the defendants were claiming to open the pretended settlement upon an allegation of mistake in omitting an allowance for the insurance moneys. To do this it was essential that they should have procured a finding which should affirm the fact of such a mistake; or, failing in that, he should have been able to convince the General Term—which alone could receive the report upon the facts—that the referee ought to have so found. In that case they would have set aside the report and have ordered a new trial. As the defendants were unable to do either of these things they cannot insist upon reversing the judgment on that account; it must therefore, be affirmed.

INGRAHAM, J. The only question submitted in this case on appeal is whether the new firm were entitled to the credit for moneys received by Jonathan K. Herrick from the insurance company, for damage by fire on the 31st December, 1862. The new partnership did not take effect until 18th March, 1853. The inventory of goods was taken in December, 1852, but whether completed or not before January, 1853, does not appear. Sales however were made down to March, 1853, and new purchases were made during the same period. In March, 1853, the stock was charged to the new firm, but

not at the amount of the old inventory. A portion of the amount allowed to the new firm was $4,000 for the damage to the stock. All these facts were known to the parties at the time of the settlement. It appears to me that the referee was fully authorized to find that the parties took these matters into consideration on their settlement, and that whatever allowance was made on account of the insurance was agreed to by the parties. It is not unreasonable to suppose that the inventory, as made in December, was not the basis of the settlement. The amount was not the same, and the referee finds there were sales made down to March, 1853, and new purchases of goods. His inference that, by some calculations between the parties, the stock on hand in March, 1853, was valued at the amount at which it was charged to the new firm is waranted by the evidence, and disposes entirely of the questions raised on this appeal. If the value of the stock in March was ascertained, then the new firm would have nothing to do with the proceeds of the goods sold or burned previous thereto. The referee finds there is no satisfactory proof that $4,000 was allowed to the new firm on account of the goods burned. If the proof was satisfactory to show that it had been allowed there might be some reason for the claim on behalf of the new firm that that firm had an interest in the insurance.

The finding of the referee on these points renders any examination of the question as to the power of Herrick to deny the validity of the claim against the insurance company, whether he received more than enough to cover his loss would be very immaterial in this action. The defendants had no interest in it. If he received more than he was entitled to, the company could have recovered it from him or his representatives; but the new firm clearly were not entitled to it, if they settled on the value of the stock as it existed in March, 1853.

There is no ground for interfering with the judgment. The same should be affirmed.

JOEL HALL and others, v. THE CITY OF BUFFALO and others.

A corporation consists of officers and agents, some of whom must represent the corporate body in such a sense, as to render him a proper party to receive notice for and on behalf of such corporation: Per DENIO, Ch. J.

The comptroller of the city of Buffalo is such officer, according to the established usage of the city, to receive notice of claims upon a fund to be paid upon a contract between the city and a third party.

Where the contractor had drawn orders in favor of divers parties upon such fund, and had directed the orders to the comptroller of the city, which orders had been presented to him, and by him had been attached to the contract of the drawer, *held*, that the city had notice of such claims, and were liable to the extent of the funds in their hands out of which said orders were to have been paid.

Such orders were equivalent to an assignment of so much of the fund in the treasury of the city, and the city was thereby constituted trustees of the parties interested.

In equity, an order given by a debtor to his creditor, upon a third person having funds of the debtor, to pay the creditor out of such funds, is a binding equitable assignment of so much of said fund.

THIS action was in the nature of a bill in equity to enforce the payment of, and to settle the right of the plaintiff, and of the defendants, other than the city of Buffalo, to certain moneys which it was alleged the city corporation owed to Moses Baker, one of the defendents, on a contract between him and the city, for the grading of certain public grounds, which moneys it was alleged Baker had assigned in separate sums to the several plaintiffs, and to some of the defendants who had declined to become parties plaintiffs in this action.

The case established by the pleadings and proofs, was substantially as follows: In October, 1849, Baker entered into a contract with the city, to fill up and grade certain market grounds at a certain price per cubic foot, to be paid in orders on the general fund of the city. The work had been performed, and certain payments had been made to Baker, and to persons whom he had authorized to receive portions of the money; and on the first day of June, 1852, an adjustment took place by which it was ascertained that the sum of $1,003.26,

remained unpaid on the contract. The present controversy related to this balance.

During the progress of the work, and in the year 1850, Baker drew four several orders on Mr. Cadwallader, the comptroller of the city, in favor of the plaintiff, Edwin Rose, for different sums, making together an amount somewhat larger than the balance above mentioned as unpaid. They each contained a request that the comptroller would pay to the individuals named in them, or order, the sums mentioned in them, "in orders on my contract in filling Elk street market grounds when the same are drawn." Another order was drawn by Baker on the comptroller, in July, 1850, for $1,000, in favor of the defendant, A. D. Patchen, as administrator of L. F. Tiffany, upon which Patchen sued the city and Baker, but the case had not been determined when the present action was tried. During the same year, 1850, Rose drew certain other orders, called in the case *sub*orders, on the comptroller in favor of other individuals for several amounts, making together a somewhat less amount than the aggregate of the four orders. The idea appears to have been, that Rose, by virtue of the four orders which Baker had drawn in his favor, being entitled to receive the aggregate amount mentioned in them, again transferred that amount to the several persons to whom the suborders were given. Some of these last mentioned orders were again assigned; and Rose, who gave them, had purchased and taken up some of them. The plaintiffs, and those of the defendants who claim portions of the money, were holders of these drafts at the time of the commencement of this action. The referee, before whom the case was tried, found that all the orders were drawn for valuable considerations. They were taken to the comptroller by the several payees, and he placed them on file, pinning them to Baker's contract with the city. The following is contained in the conclusions of fact of the referee: "It was customary in the comptroller's office, when contracts for work had been made in similar cases, to receive orders and sub-orders, like the ones in question; and when orders were directed to be drawn by the common council, pursuant to

such contract, to deliver orders to the persons holding orders therefor, and to divide the orders for that purpose."

On the 14th November, 1861, Baker served on the comptroller a written notice to the effect that he countermanded all orders given by him to said Rose, for orders on the Elk street market contract, and required the comptroller to deliver those thereafter to be drawn for that work, only to said Baker or his authorized agent.

Upon the ascertainment of the balance due on Baker's contract, in June, 1852, the common council passed a resolution directing an order to be drawn for that balance in favor of Baker, upon the general fund; and the city clerk accordingly drew such an order for the $1,003.26, and delivered it to the city clerk. After this, Baker commenced an action against the city on the contract, and obtained judgment for the above mentioned balance, which judgment was paid by the city. None of the persons holding any of the orders were made parties to that action.

The referee decided that the city of Buffalo was liable to pay the aforesaid balance with the interest thereon from the time of the adjustment, and he proceeded to distribute the same among the several holders of the drafts according to what he considered their respective rights and interests in the fund. It appearing that after the whole balance was applied, Baker would be indebted to Rose, upon the orders, in $269.43, judgment was rendered in favor of Rose against Baker for that sum. The plaintiffs were awarded their costs against the city.

On an appeal taken by the city corporation to the General Term the judgment was there affirmed, upon which the city appealed here.

H. L. Cutting, for the appellant.

H. C. Day, for the respondent.

DENIO, Ch. J. It is not surprising that the common council of the city should have declined the task of settling the rights of the claimants to the moneys which Baker had

earned, and should have preferred to cut the knot, which it had become difficult to untie, by acting upon Baker's revocation of the orders which he had given, and paying the money directly to him. They seem to have made that election by directing a draft on the treasury, for the balance, to be given him. It is not apparent why the draft was not paid without a suit. If it was thought that a judgment in his favor would protect the city against the demands of the parties holding the orders, it was a mistake. If these parties had acquired claims on the funds which the city was bound to recognize, that obligation could not be discharged by any judgment resulting from a litigation to which they were not parties. The case therefore is the same as though they had voluntarily paid the money to Baker, in total disregard of the orders which he had given.

The evidence is quite satisfactory to charge the city with notice of the existence of these orders. They were actually lodged with the comptroller soon after they were drawn, and this was in pursuance of a practice prevailing in that office. The special duties of the comptroller are not prescribed by the charter, further than by declaring that any financial power or duty confided to any city officer may be vested exclusively in him. (Laws 1843, p. 120, § 12.) This authority, together with the custom found by the referee, was sufficient, *prima facie*, to cast the onus upon the city of showing by their by-laws that his duties did not embrace the subject of the city indebtedness. A corporation consists of officers and agents, some of whom must represent the corporate body in such a sense as to render him a proper party to receive such a notice. Baker's revocation of the orders was served upon the comptroller, and as the common council acted upon that revocation, the presumption is inevitable that the revocation came to its knowledge, and as it pre-supposed the existence of orders, it was sufficient at least to put it upon inquiry. I do not say that what was done by the comptroller amounted to a contract with the holders of the orders in the nature of an acceptance or an engagement to

pay them. It was sufficient to charge the city with notice of the orders and of their contents.

The question then is whether the orders, they having been given for value, amounted to an assignment or appropriation of portions of the indebtedness which was accruing in Baker's favor against the city, to their benefit respectively. I do not suppose that any privity of contract is established between the city and the holders of the orders. It is sufficient if these holders, by their transactions with Baker and the notice to the corporation, had acquired an equitable interest in the fund. If that be established, it follows that the city, as the holder of the fund, was the trustee of the parties interested in it, and could not equitably do anything to prejudice the interest of these parties. That the holders of the orders had acquired such an interest seems to me well established by authority. In *Row* v. *Dawson* (1 Ves., Sr., 331) it appeared that one Gibson had lent money to parties under whom the defendant claimed, and gave them an order on Swinburne, the deputy of Horace Walpole, who was an officer of the exchequer, for the payment out of the moneys due to him from Walpole, out of the exchequer, of £400 to one of the persons, and £200 to the other, "value received." The question was whether the representatives of these persons were entitled to a specific lien upon the moneys due from the exchequer to the estate of Gibson, he having become a bankrupt, and it was held that they were entitled to such lien. Lord HARDWICKE said: "This draft, which amounts to an assignment, is deposited with the officer, Swinburne, and therefore is attached immediately upon it, so that Swinburne could not have paid the money to Gibson, supposing he had not been bankrupt, without making himself liable to the defendants, because he would have paid it with full notice of the assignment for a valuable consideration."

In *Yeates* v. *Graves* (1 Ves., Sr., 280), the facts were that Dawson owed Yates and Brown £450, for which they held his note. By an arrangement between Dawson and Graves and Dickinson, the latter was to purchase a dwelling-house of Dawson. Yates and Brown pressed Dawson for payment on

the note, and he gave them an order on Graves and Dickinson for the amount of the note out of the purchase-money of the house "for value received" and the note was given up. The order was not accepted, but Graves and Dickinson verbally agreed that when the purchase-money was to be paid Brown should receive notice to attend. Dawson afterward became bankrupt; Lord Chancellor THURLOW said, "this is nothing but a direction by a man to pay part of his money to another for a foregone valuable consideration. If he could transfer he has done it; and, it being his own money, he could transfer. The transfer was actually made. They were in the right not to accept, as it was not a bill of exchange. It is not an inchoate business. The order fixed the money the moment it was shown to Graves and Dickinson;" and he made a decree accordingly.

Passing over a considerable period of time we come to *Lett* v. *Meries* (4 Lewinz, 607), where a builder, who was erecting a house under a contract, gave an order to one who had furnished him with lumber, for certain sums out of moneys which would become payable to him on the contract. It was held a good equitable assignment, and so much of these moneys as the orders called for was decreed to be paid to the holder of the order. See also, to the same general purport, *Burn* v. *Carvalho* (4 Mylne & Craig, 690), and *Rodeck* v. *Gandall* (15 Eng. Law and Eq., 22). In the first of these cases Lord Chancellor COLDENHAM laid down the equitable principle in these words: "In equity, an order given by a debtor to his creditor upon a third person having funds of the debtor to pay the creditor out of such funds, is a binding equitable assignment of so much of the fund." He quotes the dictum of Lord ELDON in *ex parte Louth* (3 Levinz, 293), as follows: "It has been decided in bankruptcy that if a creditor gives an order on his debtor to pay a sum in discharge of his debt, and that order is shown to the debtor, *it binds him.* On the other hand, this doctrine is brought into doubt by some decisions in courts of law which require that the party receiving the order should in some way enter into a contract. That has been the course of *their* decisions; but

it certainly is not the doctrine of this court." Lord COLDENHAM adds, that "it is upon this principle that assignments of future freight, and of non-existing but expected funds have been enforced in equity."

The principle of these cases has been adopted and frequently acted on in this country. (2 Story's Eq., 1044; *Peyton* v. *Hallet*, 1 Caines, 363; *Waters* v. *Barker*, 12 Johns., 276; *Bradley* v. *Root*, 5 Paige, 362; *Martin* v. *Naylor*, 1 Hill, 583.) Many other cases of a similar character are referred to in those which have been cited. In *Field* v. *The Mayor, etc., of New York* (2 Seld., 179), a similar question came before this court. One who had contracts with the corporation of the city of New York for printing, for a valuable consideration, assigned, to a party under whom the plaintiff claimed, his bills against the corporation, to the amount of $1,500, to be paid after two prior assignments had been satisfied. The only notice given to the city was a letter to the comptroller, accompanied with a copy of the assignment. It was held that the assignment was a transfer enforceable in equity, and that the plaintiff was entitled to a decree against the city. (See also *Lowery* v. *Steward*, 25 N. Y., 239.)

The orders in these cases were not bills of exchange. They were payable out of a particular fund, and that fund was to arise and be made available subsequently to the drawing of the orders, and there is some doubt whether they could be considered as payable in money. The judgment which it is proposed to give will not be in any respect hostile to the cases which hold that the drawee of a proper bill is liable to the holder only upon an acceptance of the bill. (*Luff* v. *Pope*, 5 Hill, 417; *Harris* v. *Clark*, 3 Comst., 93; *Mandeville* v. *Welch*, 5 Wheat., 277.) The point decided in the last case was that the drawing by a creditor of a bill upon his debtor in favor of a third person, with some other slight circumstances, did not amount to an assignment of the debt. Stress was laid by the counsel, who argued against the position, that it was an assignment, upon this circumstance, that the bill was general and not payable out of a particular fund. What was said by Judge STORY, in giving the reasons of the

court, of the impossibility of deciding a demand by an assignment of a portion of it, was probably correct in the application which he made of the principle, but if it was intended to state that equity would not protect an assignment of part of a demand, the dictum is hostile to nearly all the cases I have referred to, and especially to the one in this court which distinctly presented that feature.

The orders in this case were not expressed to be for value received, as in some of the cases cited. It was, however, proved and found that they were given for value. I do not think it was necessary for the city to have had specific notice of that circumstance. The drawing of the first class of orders, and the transfer by Rose of the interest which they were supposed to create, was sufficient evidence to put the city upon inquiry, and to show conclusively that Rose was not the mere agent of Baker. A proper inquiry would have disclosed the fact that they were given for a valuable consideration.

The appeal being on behalf of the city alone, no question is presented respecting the distribution of the money among the different claimants. The recovery was for the precise amount which the city would have owed Baker if he had not parted with his claim. The orders which he had given to Rose exceeded the whole balance in his favor. It cannot, therefore, be said that injustice has been done to the city, even should the disposition of the moneys be inaccurate, of which I have found no evidence.

It is objected that it was not proved that Baker was insolvent; and that is true, though this contest among his creditors leads to a strong inference that such was the fact. I do not see, however, that it was essential to establish that fact. If, as has been held, the drawing of the orders was a transfer *pro tanto* of the debt, the holders were entitled to resort in the first instance to the city to enforce their demands, and it would have been no answer for the city to say that they might have had a remedy against Baker.

It is readily seen that the principle which we feel bound to act upon may operate inconveniently upon parties owing

demands of this character, by obliging them to arrange with several parties claiming under the one with whom they had contracted. But the same difficulty frequently arises where a creditor has parted, by mere formal transfers, with the whole or portions of the debt. The law affords the debtor a remedy in the nature of a suit of interpleader, so that it is his own fault if he pays to a person not entitled. If the rule would still operate inconveniently to municipal corporations, who are, perhaps, more exposed than others to be embarrassed with conflicting claims, it is for the legislature to protect them. They might also provide by express agreement that they should not be obliged to recognize derivative claims arising out of a contract for a public improvement.

I am in favor of affirming the judgment appealed from.

INGRAHAM, J. The indebtedness of the city of Buffalo for the amount claimed by Baker as due him is admitted, it being alleged in the complaint and not denied in the answer. The only allegations denied in the answer of the appellants are; 1. As to the drawing of the orders by Baker; 2. The acceptance of the orders by the city; and, 3. Whether the assignment of the orders set forth in the complaint were executed. The first and third of these defenses were proved on the trial and were found by the referee against the defendants. I do not understand the appellants as insisting on these defenses. The only remaining one set up in the answer is to the acceptance by the defendants of the orders, so as to bind the city to the payment.

The referee finds that Baker drew five orders on the comptroller in favor of Rose for the sum, in all, of $1,189.79. That Rose delivered the orders to the comptroller, who annexed them to the contract of Baker. The amount due Rose was subsequently reduced somewhat by repayment. Afterward the amount due Baker from the city was adjusted and an order for that amount was directed by the council to be drawn in favor of Baker.

There can be no doubt that the assignees of such a claim might give notice of the assignment to them and recover

the same without an actual acceptance by the debtor of the order or promise to pay to the assignee. This was held in *Morton* v. *Naylor*, 1 Hill, 583. COWEN, J., says:—"The order was an equitable assignment of the rent in question, with notice to Morton who was bound to pay it according to the order whether he had accepted it or not." (*Wheeler* v. *Wheeler*, 9 Cowen, 34.) Nor is it any objection to a recovery under such an order or assignment that it is not for the whole of the balance due. (*Taylor* v. *Bates*, 5 Cowen, 376; *Pattison* v. *Hull*, 9 id., 747; *Field* v. *The Mayor, etc., of New York*, 2 Seld., 179.) Whether there was or not any valid defense in the matters relied on by the appellants of a payment to Baker is unnecessary to be decided in this action. No such defense was set up in the answer and the appellants have no right to avail themselves of the finding of the referee which may have been necessary under the issues raised by the other defendants.

The objection that notice to the comptroller was not notice to the city of Buffalo is taken by the appellants. In *Field* v. *The Mayor, etc., of New York, supra*, the same objection was taken and overruled. The court say the notice of the respondent's claims was served upon the comptroller while in his office, engaged in the duties thereof, and was beyond all doubt sufficient.

I think the judgment should be affirmed.

All the judges concurring,

Judgment affirmed.

MALTBY G. LANE, Appellant, v STEPHEN LUTZ, FRANCIS DOLL, JOHN GERMANN, ANTHONY LAMBRECHT, and MERWIN R. BREWER, Respondents.

In an equitable proceeding, the court will not direct the receiver to sell property without first giving a party claiming title thereto, a hearing.

As affecting the rights of parties, it is not essential that a chattel mortgage should have been on file at the commencement of an action in which the existence of the mortgage is recognized.

The statute declaring that a chattel mortgage shall be absolutely void as against the creditors of the mortgagor, when the property is left in his possession, unless filed, does not include creditors at large.

The creditor must have attached the mortgaged property and have acquired a lien upon it in some legal way before the question can be raised.

THIS action, in the nature of a creditor's bill, was brought by plaintiff, as assignee of a judgment obtained by David Lane, James G. Carpenter, and Henry W. Miller, against Lutz, Doll & Germann, upon the return of an execution unsatisfied, to set aside a sale made by them in May, 1854, of the "Manhattanville line" of stages, horses, etc., to the defendant, Lambrecht; and also to set aside an assignment, made at the same time, by Lutz, Doll, and Germann, to Brewer.

Husson was not a party to the suit, but held a chattel mortgage on the property sold to Lambrecht, which mortgage is mentioned in the complaint and its validity is nowhere questioned by the pleadings.

The case was tried in April, 1855, before Judge MITCHELL, in the first district, who decided and adjudged the sale and assignment void, and directed the appointment of a receiver, to sell the whole property "*subject to the same incumbrances to which it was liable when Lambrecht took it.*"

The principal of these incumbrances were chattel mortgages, of which Joseph Husson, the respondent in this appeal, was assignee, from Benjamin Moore, to whom they were originally given. Moore originally owned the stage line and the property connected with it, and as early as 1852 sold the same to

Lutz, Doll & Germann, from whom he took a chattel mortgage thereon, to secure $11,000 a part of the purchase-money. In February, 1853, a portion of the mortgage having been paid, a new mortgage for the balance of $8,600 was executed by Lutz, Doll & Germann, to Moore, leaving the first mortgage uncanceled, and reciting that it covered a part of the amount due thereon. This mortgage was filed March 23d, 1853, having been previously, on the 19th day of the same month, assigned by Moore to Husson the respondent.

In February, 1854, a further assignment having been made, a new mortgage for the balance, $6,200, was given by Lutz, Doll & Germann, to Husson, leaving the previous mortgage uncanceled, and reciting that it covered a part of the amount due thereon. This mortgage was not filed till the 25th day of January 1855, after the commencement of this action, which was on the 20th day of October 1854. The sale by Lutz, Doll & Germann, to Lambrecht, which it was the object, in part, of this suit to set aside, was made on the 31st of May 1854, and was in terms subject to the chattel mortgage last mentioned, which was assigned by Lambrecht, and on which he made some payments, and on the 23d of February, 1855 he gave a new mortgage to Husson for $3,800, the balance remaining due on the previous mortgage. This last mortgage was filed on the day of its date, February 23d 1855, but several months after the commencement of this action.

The plaintiff's debt against Lutz, Doll & Germann, accrued in 1853 and 1854, while the latter were owing the chattel mortgages in question, of which the plaintiff had notice—constructive notice of, and by its having been filed and actual notice of both, in April and May, 1854, three months before they obtained the judgment by confession against Lutz, Doll & Germann, which operated as the foundation of this action. That judgment was confessed August 17th, 1854; execution was issued and returned unsatisfied thereon on the same day. It is probable the plaintiff was not informed, until after the commencement of this action, of the fact that Husson's mortgage was not filed.

On the 11th day of October, 1854, David Lane & Co., assigned the judgment to plaintiff.

On the 14th October, 1854, plaintiff commenced this action, "to set aside the sale of the stage line and the property belonging thereto, and that the deed of said lots above described, and said assignment, be set aside, and the whole of said property belonging to said stage line, as well as said six lots and buildings thereon, or so much thereof as shall be necessary, be applied on the payment of the plaintiff's said judgment."

(The complaint admits the existence of Husson's chattel mortgage. No fraud is alleged respecting it, and Husson is not made a party.)

The suit was tried before Judge MITCHELL at Special Term, who decided, April 21, 1855, the sale and assignment void, and directed the appointment of a receiver "to sell the whole property, subject to the same incumbrances to which it was liable when Lambrecht took it."

Plaintiff never appealed from this finding, or attempted to alter or modify it.

A receiver was appointed April 25, 1855, who advertised and sold the property, May 5, 1855, and subsequent days. The handbills of sale prepared by the receiver and plaintiff's attorney, say: "If sold together, the present property will be sold subject to two chattel mortgages, but if sold in parcels it will be free from incumbrances." Husson's mortgage being one of them.

An attempt was twice made to sell in bulk on the 5th of May, but no bids being made, it was sold in parcels, under the understanding and agreement on the part of the plaintiff and Husson, that his mortgage should be first paid from the proceeds of sale. This was Husson's first connection with this suit.

Previous to the sale by the receiver, both plaintiff and his brother David Lane saw the mortgages in Husson's office, and David (who was one of the plaintiffs in the original suit, and who is charged to be the real plaintiff in interest in this suit) offered to pay Husson an installment of $200, then due

and owing by Lambrecht, to prevent a foreclosure of his chattel mortgage.

The property was sold in parcels, and notwithstanding the understanding and agreement made by plaintiff with Husson, the funds were brought into court by the receiver.

By this agreement made with the plaintiff, previous to the sale, Husson permitted the sale to be made free from his mortgage, and the articles to be separated, expecting to be first paid.

An order was entered, October 23, 1855, referring the accounts of the receiver to a referee for examination, to take proof of and pay the liens, if any; upon this order, served upon Husson, he was brought in to prove his claim, but was never otherwise made a party thereto.

The funds in receiver's hands proving insufficient to pay the liens, a question is now raised by the plaintiff that Husson's mortgage not having been filed, it is void as against him and that he, and not Husson, is entitled to the fund in court.

Husson produced before the referee the several mortgages and assignment held by him, proved the facts above stated, that the original mortgage to Moore was for part of the purchase-money, that it had been reduced by payments and the subsequent mortgages given in renewal, to show the true amount due, and that Lutz, Doll & Germann, and Lambrecht never claimed, except subject to Husson's mortgages.

The referee reported November 1, 1856, after a year's litigation before him, that there was due to Husson $4,024.90, and that the net proceeds of sale of the articles mortgaged to him amounted to $3,609.70, which amount he ordered the said receiver to pay to Husson, and annexed to his said report the questions of law and fact, as decided and found by him.

On appeal to the Special Term, the referee's report was confirmed, and on further appeal to the General Term the judgment of the Special Term was affirmed, no opinion being delivered by the latter court.

The reasons assigned by the referee and by the Special Term in support of the conclusions at which they arrived

were substantially these: 1. That although the statute (2 R. S., 136) declares that the mortgage, unless filed, shall be absolutely void as against the creditors of the mortgagee, and subsequent purchasers and mortgagees in good faith, yet the creditor may waive this right, and treat the mortgage as valid, and be estopped by his acts from insisting upon its invalidity. 2. That although the plaintiff might perhaps have treated the mortgage as a nullity, and sold the property under his execution irrespective of it, or filed a bill for the single purpose of removing out of the way of his execution the fraudulent obstruction interposed by the mortgage, yet he has done neither of these things, but causing his execution to be returned unsatisfied, has filed a bill in the nature of a creditor's bill to reach the equitable interests of his debtor, and charged those interests to be the property, real and personal, connected with this stage route, subject to the mortgage now in question, seeking to apply that property thus subject to, and not regardless or independent of that mortgage, to the satisfaction of his debt. 3. That the Special Term, on the hearing of that case, to which Husson was in no wise a party, in conformity with the aspect of it presented by the plaintiff, pronounces the sale to Lambrecht and the assignment to Brewer fraudulent and void, and directs the receiver to sell the property, subject to the same incumbrances to which it was liable when Lambrecht took it, the mortgage to Husson being one of these; that the plaintiff subsubmitted to this order and acted upon it; that under it the receiver took and could sell no more than the interest of the mortgagors subject to the mortgage. 4. That the advertisements of sale, the understanding and conversations of the parties interested therein, and the sale itself, were in conformity with those views, and showed the concurrent construction put by all of them upon the order of the court to be, that it was the proceeds of the sale subject to the mortgages, or the net proceeds after deducting the mortgages, to which the plaintiff was entitled under the judgment of the court, and nothing more, and that, therefore, when the plaintiff and Husson agreed that if the property was sold

in parcels it was to be free from incumbrance, they intended, and, indeed, expressly agreed, that Husson's mortgage should be first paid out of the proceeds of the sale. 5. That such also was the equitable aspect of the case; that the Husson mortgage was given for the balance of the purchase-money; that in equity Lutz, Doll & Germann never owned the entire interest in the property, and that so much as was not paid for equitably belonged to Moore, or Husson, his assignee.

From the judgment of the General Term the plaintiff has appealed to this court.

Solomon L. Hull, for the appellant.

Marshall S. Bidwell, for the respondent.

HOGEBOOM, J. The reasons rendered by the referee at the special term for the disposition of the case made in the court below appear to me to be cogent and conclusive, and I do not deem it necessary to enlarge upon them. I content myself with a brief reference to some of the propositions advanced by the counsel for the appellant.

1. It is said that the commencement of this action operated to confer upon the plaintiff a specific lien upon the property in question, and that the mortgage of Husson was entirely inoperative against the plaintiff because it was not filed.

It is not necessary to discuss either of these propositions, because the decision in favor of Husson is placed upon a ground entirely distinct and independent of these and consistent with the assumption that both of these propositions may be entirely correct.

2. It is said that Husson's mortgage being thus entirely void he was not in any way prejudiced by the sale. But, as to this, it must be observed: First, that Husson was not a party to the action, and has had no opportunity to set up by answer or fully to establish by proof what facts he might wish to present by way of obviating the necessity for filing his mortgage; second, Husson was undoubtedly prejudiced by the sale if it was not carried out in conformity with the stip-

ulation to which he was a party, and on which he relied for the protection of his interests.

3. It is said that the alleged agreement, that Husson was to be paid out of the proceeds of the sale, was void as being without consideration, and being void could not operate as an estoppel against the plaintiff. First, this assumes what Husson has not had an opportunity fully to controvert, to wit, the invalidity of his mortgage. Second, the agreement was not without consideration. Husson at all events made a claim under his mortgage, and the claim was sufficiently plausible and colorable to operate as the foundation of a sufficient consideration to make some equitable arrangement in regard to it. The plaintiff had not treated it as invalid, nor made Husson a party to a suit to set it aside, and the court had expressly directed a sale subject to it. The bounden duty of the receiver was to conform to the order of the court, from which plaintiff had taken no appeal, and the latter was not therefore in a situation to attack the mortgage of Husson. But, apprehending that the mortgage of Husson might embarrass the sale and cause a sacrifice of the property if sold in parcels, the plaintiff made an explicit arrangement with Husson, which the plaintiff expected to be advantageous to him, but which he now wishes to repudiate, that the property should be sold, discharged of the incumbrances which were to be paid out of the proceeds. I think the plaintiff is precluded from receding from his agreement by every consideration which enters into the idea of an equitable estoppel.

4. It is said that the plaintiff acted in ignorance of the fact that the mortgage was not filed, and therefore should not be bound by the course of proceeding to which he assented. First, it is probably true, though it does not appear to be expressly proved, that plaintiff was ignorant of the filing of the mortgage, but there is no pretense or proof that Husson fraudulently concealed that fact from him. The plaintiff had an opportunity and was bound to acquaint himself with the fact, and his neglect to do so was his own misfortune. He must be bound by his agreement if he was not inequitably sur-

prised or fraudulently entrapped into it by Husson. Second, there is no certainty that he would not have made precisely the agreement that he did if he had been aware of the non-filing of the mortgage. He does not say that he would not. He had instituted proceedings without making Husson a party, having entirely a different aspect, which disabled him from setting aside that mortgage without entirely revolutionizing the framework of his proceedings. The court had made an order upon the assumption that Husson's mortgage was to be paid. The plaintiff had practically adopted that order, and if he had then ascertained for the first the non-filing of the mortgage he might perhaps have very rationally concluded that it was better to go on and take his chances for ultimate compensation out of the proceeds of a sale subject to the mortgage, which he probably supposed would protect his debt as well as the mortgage, than to retrace his steps, pay the costs, begin anew, make Husson a party to the new proceedings, charge the invalidity of the mortgage, with the chances of possible, if not probable discomfiture.

In every aspect in which I have been able to consider the case I think the order of the court below was right and should be affirmed.

WRIGHT, J. The appeal is by the plaintiff from so much of the judgment as declares Husson to be entitled, as the holder of a chattel mortgage upon the property, to be paid out of the fund arising from a sale of such property under the order of the court. The action was by the plaintiff, a judgment creditor of the defendants Lutz, Doll and Germann to set aside what was claimed to be, a fraudulent transfer of the property by them to the defendant Lambrecht, and to have the same sold, and the proceeds applied to the payment of his judgment. Husson, who held a chattel mortgage on it, for a part of the purchase-money (the existence of which mortgage the assignees of the plaintiff had knowledge of, before obtaining a confession of the judgment), was not made a party. The court decided the sale and assignment to Lambrecht to be void, and instead of simply setting aside the

conveyance, and allowing the plaintiff to issue a new execution, directed a receiver to be appointed to sell the property, subject to the same incumbrances to which it was liable when transferred to Lambrecht. This was the only direction that could rightly have been given. At the time Lambrecht took the property, it was subject to Husson's mortgage, which had been given to Lutz, Doll and Germann for an unpaid portion of the purchase-money. Husson, not being a party, his rights could not be affected by any proceeding in the suit; and the court having set aside the fraudulent conveyance to Lambrecht, and taken the property into its own hands, could not equitably make any other disposition of the case. The only question involved was as to what passed to Lambrecht by the conveyance from Lutz & Co., which was adjudged to be void; and this was the property which Lutz & Co. held, subject to the Husson mortgage. This mortgage was a valid lien as against them when the conveyance was made to Lambrecht; and the plaintiff, while admitting this, did not make Husson a party to the suit, or suggest that his mortgage was invalid, or ask any relief other than the pretended transfer to Lambrecht might be set aside. All that the receiver could rightly take under the order, or could sell, was the property, subject to Husson's mortgage. The court might have directed the mere title of Lutz, Doll & Germann to be sold, without giving Husson an opportunity to be heard; but in an equitable proceeding no court orders a receiver to sell the thing itself, without giving a party claiming title to it, a hearing. The plaintiff acquiesced in the decision appointing a receiver to make sale of the property itself, subject to the incumbrance to which it was liable, when transferred to Lambrecht; making no attempt to alter or modify it, but consenting thereto. His attorney subsequently, in concert with the receiver, prepared notices of the sale of the property, in which it was stated, that if sold in bulk, the sale would be subject to two chattel mortgages (Husson's mortgage being one of them), but if sold in parcels, the sale would be free from incumbrances; and afterward, and on the day of sale (the plaintiff, Husson, and other parties interested in the

property, being present), an attempt was twice made to sell in bulk, but no bid being made, it was sold in parcels, and as the evidence clearly shows, in pursuance of an understanding and agreement between the plaintiff and Husson, that the mortgage of the latter should be first paid from the proceeds of the sale. Having this agreement with the plaintiff, Husson permitted the sale to be made free from his mortgage, and the articles to be separated, expecting to be first paid; but, in disregard of the agreement, the entire proceeds were brought into court by the receiver. Subsequently a reference was ordered to examine the accounts of the receiver, and to take proof of, and pay liens, if any; a copy of the order and notice of the reference being directed to be served on Husson. At this point of time Husson first appeared as a party to the litigation, and, very plainly, thus informally drawn in, if not on the plaintiff's own motion, at least by his consent. Up to this time, it seems all the parties interested seem to have agreed, that it was the net proceeds of the property, after payment of all the incumbrances, including Husson's mortgage, that the plaintiff was entitled to under the decision and judgment of the court, and nothing more. It had been supposed that the whole property of the Manhattanville line would sell for a sufficient sum to meet the incumbrances and pay the plaintiff's judgment; and on this supposition the plaintiff acted, in concert with Husson, up to the time of the sale. In this there was a disappointment; the proceeds thereof being insufficient to meet the liens. Accordingly, on the reference the plaintiff endeavored to avoid them entirely.

The objection urged before the referee against considering Husson's mortgage a lien upon the proceeds of the sale was, that such mortgage was not filed at the time the plaintiff's action was commenced. I do not think the objection valid. It was not important, as affecting the rights of the parties. that the mortgage should have been on file when the suit was instituted. As the statute declares, in terms, that an unfiled chattel mortgage shall be void as against the creditors of the mortgagor, it is probable (although the mortgage in this case was but a continuance of a series of mortgages for

the unpaid balances of the original purchase-money for the property due from Lutz & Co., and the plaintiff had actual notice thereof), that had the plaintiff, on obtaining his judgment against the mortgagors, issued his execution and sold the property then in the hands of Lambrecht, he could not have been held as a trespasser at the suit of Husson, the mortgagee. But an essentially different course was pursued. Whilst the mortgage was confessedly valid as against the mortgagors without filing, and could have been made so at once as against their creditors, an action to reach the equitable interest of the mortgagees in the property was commenced. Lambrecht was, at the time, in possession of the property as owner, by virtue of a transfer from the mortgagors, and recognizing the Husson mortgage as a valid lien, the only relief prayed for was to set aside the transfer to Lambrecht. All that was attempted to be reached, and indeed all that could be reached, was the interest which Lutz, Doll & Germann had in the property in the hands of Lambrecht; and this interest was their equity of redemption, or right to any surplus beyond the mortgage. To enable the plaintiff to reach the interest of Lutz, Doll & Germann in the property, it was sought to have the transfer to Lambrecht set aside, which was a transfer subject to the mortgage. Procuring this transfer to be set aside did not entitle the plaintiff to reach an interest which Lutz, Doll & Germann never conveyed. As between Lutz & Co. and Husson, there is no pretense that the mortgage can be impeached, and the court did not, and equitably could not (Husson not being a party to the suit) give the plaintiff greater rights than the extent of Lutz, Doll & Germann's interest. This was all that was done, and the plaintiff submitted to a judgment, limited to setting aside the sale to Lambrecht, as to him, and directing, not a sale of Lutz & Co.'s interest in the property, but a sale of the property itself, subject to the same incumbrances to which it was liable when transferred to Lambrecht. The judgment obtained by the plaintiff, under such circumstances, does not entitle him to payment of it in prefer-

ence to Husson's mortgage. The lien acquired by the filing of the complaint was not a specific lien upon the property in question, but only on the equitable assets of Lutz, Doll & Germann, in the hands of Lambrecht. It extended only to such estate as Lutz, Doll & Germann had in the property, and to that extent and no further, the filing of the complaint operated as an equitable attachment. It could not effect the prior title to or lien of a person not made a party to the action. The case would have been different had the plaintiff, after obtaining his judgment, issued an execution and levied upon the property itself. That would have been the case of a judgment creditor levying an execution upon specific property of his debtor, and raising the question affecting the title or right of a third person to or in the thing itself. There was, therefore, no lien acquired in this case upon the property by the filing of the complaint in October, 1854, and when the Husson mortgage was off the files in the register's office. It was entirely immaterial in this equitable proceeding to reach the assets of Lutz, Doll & Germann, as affecting the rights of Husson, whether or not his mortgage was on file when the suit was commenced. The statute, it is true, declares that a chattel mortgage shall be absolutely void as against the creditors of the mortgagor when the property is left in his possession, unless filed. This does not mean creditors at large.

The creditor must have attached the mortgaged property and acquired a lien on it in some legal way before the question can be raised. If it be a judgment creditor, as in this case, his execution must be levied. Here there was no levy. Lambrecht was, at the time the execution was returned unsatisfied, the owner of the chattels and in possession, subject to Husson's mortgage. By instituting an equitable proceeding to collect his debt the plaintiff acquired no lien, nor was he in a position of a creditor entitled to allege that Husson's mortgage, from not being filed when he commenced the proceeding, was absolutely void as against him. If, however, he was in a situation to raise the question of the invalidity of Husson's mortgage as against him, on the

ground that it was not filed in October, 1854, it is clear to my mind that a creditor, as in this case, with full notice of a prior mortgage, seeking to collect his debt out of specific property, by a proceeding in equity, stands in the same position as a subsequent purchaser or mortgagee. He takes only the equities of his debtor.

There is, however, another reason why the plaintiff is not entitled to have the proceeds of the sale applied in payment of his judgment in preference to Husson's mortgage. On the face of his complaint it had been shown that the transfer to Lambrecht was made subject to Husson's mortgage, the validity of which was nowhere questioned, Husson not being a party. The court must either have given a judgment simply setting aside the conveyance, or do, what it undoubtedly possessed the power of doing, set it aside and take the property and dispose of it equitably. Accordingly, a judgment was given declaring the conveyance to Lambrecht to be void, and ordering the appointment of a receiver to take and sell the property, subject to the incumbrances upon it at the time of the transfer—Husson's mortgage being the only lien. In this judgment the plaintiff acquiesced and has never appealed from it. If he had appealed he could not have altered it, as Husson, the mortgagee, was not a party. Husson's right to be paid his mortgage is, therefore, *res adjudicata.*

There is yet another reason for postponing the payment of the plaintiff's judgment to that of the mortgage of Husson. The order of the court was to sell the property, subject to the incumbrances, including this mortgage, and if Husson had not consented it could not have been sold in any other way. To have effected a sale of it, subject to incumbrances, would have required it to have been sold in bulk. Before the sale the plaintiff, Husson and others interested, fixed a price at which it was to be sold in bulk, and if so sold it was agreed that the Husson mortgage was to remain; but if the sale was in parcels, and the property scattered, the mortgage was to be first paid from the proceeds of sales. An ineffectual attempt was made to sell in bulk, there being no

bidders, when it was sold in parcels under this understanding and agreement. I think the plaintiff is estopped by the agreement from insisting that Husson's mortgage is not entitled to priority of payment out of the proceeds of the sale. To allow him, after the sale has taken place, on the faith of the agreement, to repudiate it, and when Husson cannot be put in the same position he was in before the sale, would be unreasonable and unjust. It would enable the plaintiff to perpetrate a wrong and a fraud upon him. It is to be remembered that had Husson not consented, the sale must have been subject to his mortgage. It is immaterial whether the plaintiff knew that the mortgage had not been filed. There was no fraud on Husson's part, and the plaintiff knew the law on the subject as much as if he had been expressly told what it was, and was bound to make inquiry or search if he thought it important. At all events, it was too late to object after Husson had allowed the sale to take place under the agreement, and could not be replaced in his former position.

The judgment should be affirmed.

Affirmed.

JAMES R. GANDALL v. CHARLES FINN.

THOMAS W. LOCKWOOD v. CHARLES FINN.

TIMOTHY MANN, SAMUEL KENDRICK, 2d, and JOHN P. MANN v. CHARLES FINN.

Under section 383 of the Code of Procedure it is enough that the nature and consideration of the debt confessed, the time in which it occurred, and that it is due and unpaid be concisely stated.

It is unnecessary that the statement should be as precise and particular as a bill of particulars.

The requirements of the Code in this particular are not to be measured by the requirements of the act of 1818. (Laws 1818, ch. 259, § 6.)

APPEAL from an order setting aside the judgment in the second above entitled action.

The facts were these: On the 11th June, 1855, James R. Gandall, the plaintiff, in the first above entitled action, recovered a judgment in the Supreme Court, by confession against the defendant, Charles Finn, for $1,506.50; which was on that day docketed in the office of the clerk of the county of Washington.

On the 14th December, 1855, Thomas W. Lockwood, the plaintiff in the second above entitled action, recovered against Finn a judgment in the Supreme Court, by confession, for $1,709.74; which was docketed on that day in the office of the clerk of Washington county.

On the 14th December, 1855, Mann, Kendrick & Mann, the plaintiffs in the third above entitled action, recovered a judgment against Finn in the Supreme Court, by confession, for $270.59; which was docketed the same day in the Washington county clerk's office. Executions on both of the last mentioned judgments were, on the 14th December, 1855, issued to the sheriff of Washington county, and levy made on Finn's store of goods on that day; and the following day an execution was issued on the Gandall judgment.

On the 17th April, 1856, Gandall commenced an action in the Supreme Court by summons and complaint, and on the

19th May, 1856, recovered a judgment against him for $1,625; which was duly docketed on that day.

At a Special Term, in September, 1856, Gandall moved to set aside the judgment in favor of Lockwood, and also the judgment in favor of Mann & Co., on the ground that the confessions of judgment do not state the facts out of which the indebtedness, for which said judgments were entered, arose.

An order was made at Special Term setting aside both judgments, and the executions issued therein, as against Gandall's judgment and execution, and directing the sheriff of Washington county, to first pay, from the proceeds of the sales under the executions, the Gandall execution, issued on his judgment of January, 1855.

From this order Lockwood appealed to the General Term of the Supreme Court, where the same was affirmed. Mann, Kendrick & Mann did not appeal.

Lockwood then appealed to this court. The confession in the Lockwood judgment is as follows:

SUPREME COURT.

THOMAS W. LOCKWOOD v. CHARLES FINN.

I, Charles Finn, defendant, hereby confess myself indebted to Thomas W. Lockwood, plaintiff, in the sum of seventeen hundred and two dollars and eighty-seven cents, and hereby authorize him, or his executors, administrators, attorney or assigns to enter a judgment against me for that amount.

The above indebtedness arose on an account of goods, wares and merchandise, sold and delivered by said plaintiff to me, since the first day of January, 1855, and for which I have not paid.

And I hereby state that the sum above by me confessed is justly due to the said plaintiff without any fraud whatever.

CHARLES FINN.

Dated the 14th December, 1855.

W. A. Beach, for the appellant, Lockwood.

Hughes & Northrup, for the respondent, Gandall.

WRIGHT, J. There is but a single question involved in the appeal, viz.: as to the sufficiency of the statement in the confession of judgment in favor of the appellant, Lockwood. The Code provides that the statement, if the debt be for money due or to become due, must set forth "concisely the facts out of which it arose, and must show that the sum confessed therefor is justly past due or to become due." (Code, § 383.) It is urged, that in the Lockwood judgment, the statement does not set forth the facts out of which the indebtedness arose, nor show the sum confessed to be justly due, within the meaning of the statute; and this appears to have been the judgment of both the lower courts.

I am not able to see such a non-conformity with the requirements of the statute, as to demand that the judgment should be set aside, at the instance of another judgment creditor. Unless we are prepared to hold that the statement, under the Code, is required to be as special and precise, as that under the act of 1818, (Laws of 1818, ch. 259, § 6), the one questioned in the present case, is good. But as was said by SELDEN, J. in *Dunham* v. *Waterman*. (17 N. Y., 9), "there is a wide difference in phraseology between the act of 1818 and the section of the Code in question. The former required a 'particular' statement and specification of 'the nature and consideration' of the debt or demand; and when the demand arose upon a note, bond or other specialty, the 'origin and consideration' of the same was required to be 'particularly set forth;' while the Code in terms simply requires a statement 'of the facts out of which the indebtedness arose.'" In *Lawless* v. *Hackett* (16 Johns., 149), a case which arose under the act of 1818, the Supreme Court said, "a statement as general as the common counts in a declaration is not sufficient. It ought to be as special and precise as a bill of particulars." Neither, however, in *Dunham* v. *Waterman*, or in any other subsequent case, has this court gone the length of holding that the Code requires the precision of a bill of particulars. It is enough that the nature and consideration of the debt confessed, the time in which it accrued, and that it is due and unpaid, is

"concisely" stated. (*Laning* v. *Carpenter*, 20 N. Y., 447; *Frelich* v. *Brink*, 22 id., 418; *Neusbaum* v. *Kenn*, 24 N. Y., 325; *Hopkins* v. *Nelson*, 24 id., 518.) In the present case, the nature of the debt, the amount thereof, within what time it accrued, and that it is unpaid, is stated. The transaction set forth is a sale and delivery by Lockwood to Finn, of goods, wares and merchandise, between January and December, 1855, of the value of $1,702.87, which Finn has not paid for. It is true, the kind of merchandise is not specified, nor at what particular time, between January and December, the sale and delivery was made, if sold and delivered in parcels; but the statement was not defective for this reason, unless the law as it now is, requires all the minuteness of a bill of particulars. It clearly does not require the statement to contain a minute description of the goods sold, or of the time and place, and terms of sale of each particular parcel.

But it is said that merely stating the facts out of which the indebtedness arose is not sufficient; the facts must show that the sum confessed is justly due, and that no fact is stated from which the court can say that the amount of the judgment is justly due. In *Laning* v. *Carpenter* (20 N. Y., 447), the confession (unlike the present one) did not state in terms that the sum for which the judgment was authorized to be entered was justly due; and the point then taken was that the statute required it to be stated in terms; but the court thought otherwise, and that the sum due must appear from the statement. "The particular facts," says Judge COMSTOCK, "must be set forth in such a manner as to show not only a just debt, but the amount thereof." That being done, an additional averment, in general terms, of the justice of the debt and the amount thereof, is not required. It is true that, although the facts stated may show, with all the requisite certainty and detail, the creation of a debt, yet it may have been paid. So, also, it may have been released or discharged by bankruptcy, insolvency, or in some other manner. But it is not required to negative all the conceivable possibilities of the case. The confession now in ques-

tion contained an averment, in general terms, that the debt confessed was justly due; but it went further. The statement also showed it. The facts stated not only showed the creation of the debt, but negatived the possibility of its having been paid. After showing, with requisite certainty, the creation of the debt and the amount thereof, it is averred distinctly that the debt is unpaid.

I am of the opinion therefore, that the order, so far as it affects the judgment of the appellant Lockwood, should be reversed. It would be difficult, I think, to distinguish between the minuteness necessary in a bill of particulars, and the "concise statement" which the learned judge at Special Term supposed would now only satisfy the requirements of the law. In *Freligh* v. *Brink* (22 N. Y., 418), the confession was held good when it described the note, and added "that amount of money being had by the defendant of the plaintiff." So also in *Neusbaum* v. *Kenn* (24 N. Y., 325), a statement was held sufficient which stated that the plaintiff had sold and delivered large quantities of meat to the defendant at various times during the years 1854 and 1855, and that there was justly due him upon such sales a balance of $2,114. In neither of these cases, were the facts set forth with more certainty and detail to show a just debt and the amount thereof, than in the present one.

The order of the Supreme Court so far as it affects Lockwood's judgment and execution, should be reversed with costs of this appeal, and his execution declared entitled to be paid out of the proceeds of sales made upon the executions, in preference to that of the respondent Gandall.

Judgment affirmed.

JOSIAH W. HARTLEY v. BENJAMIN TATHAM.

The assignee of a mortgage takes subject to all the equities of the debtor as against the assignor; and any demand which the debtor might apply or set off as against the assignor, may be so applied or set off as against the assignee.

A tender of what is due upon a mortgage — and if proceedings have been commenced to foreclose the mortgage — of the costs accrued up to the time of making the tender, extinguishes the lien of the mortgage.

ACTION to foreclose a mortgage, brought in the Superior Court of the city of New York.

Michael Cunningham, one of the defendants, in May, 1861, executed and delivered his bond and mortgage, for the payment of the sum of fifteen hundred dollars, to Samuel W. Dunscomb, or his assigns. Dunscomb on the 13th day of May, 1862, assigned and transferred the bond and mortgage to the plaintiff, who on the 16th day of June, 1862, commenced this action to foreclose the mortgage. In 1861, one Alfred A. Arment, by the consent of Dunscomb, and also by an agreement with him, became entitled to a conveyance of the mortgaged premises when certain plumbing work should be completed. In the fall of 1861, and while Dunscomb was the owner of the mortgage in question, he agreed with Arment, that he should do certain plumbing in Beekman Hill Chapel, to be paid therefor by being deducted from said mortgage. The plumbing work was done, and amounted to $490.03. Arment caused the premises to be conveyed to Tatham, and assigned his claim against Dunscomb, etc., to Tatham. This was on the 3d day of May, 1862, and ten days before Dunscomb conveyed the bond and mortgage to plaintiff. On the 9th day of July, 1862, the said Tatham tendered to the plaintiff the sum of one thousand two hundred and seven dollars and fifty-four cents, the whole amount due thereon, including costs in the action then pending — after deducting the said $490.03, for the work done under the agreement between Dunscomb and Arment. The plaintiff refused to accept the tender in discharge of the

bond and mortgage. The court found, as a conclusion of law, that the $490.03 was a valid payment upon the mortgage according to the agreement of Dunscomb and Arment, and consequently, that the tender made by Tatham as above was sufficient, and extinguished the lien of the mortgage — and judgment was rendered accordingly. An appeal was taken to the General Term where the judgment of the Special Term was affirmed, and an appeal therefrom is taken to this court.

DENIO, Ch. J. I assent to the conclusion of the Supreme Court that the $490.03 ought to be allowed as a payment on account of the interest due, and so much of the principal as it would extinguish. It follows from this conclusion, that there was no interest in arrear when the action was commenced, and hence also, that the plaintiff had no right to elect to consider the whole principal immediately payable. The complaint does indeed set forth such an election, but it was based upon the actual denial of the payment, and upon the allegation that a year's interest was in arrears. The plaintiff's case was that the whole principal and interest had become payable in consequence of the default in the payment of interest. When it was determined that there was no interest in arrear, the case made by the complaint was disproved, and there was then no foundation for the claim of the whole under the special clause in the bond and mortgage. I think, therefore, the defendant had no right to tender the whole principal without admitting a default in the payment of interest. It was an offer which the plaintiff was at liberty to reject or to accept. He rejected it, as he had a right to do. As the debtor was not bound by the election of the creditor, because the fact which authorized that election had not arisen, so the plaintiff ought not to be bound by it, because he has failed to establish the existence of the fact which alone gave him the right to make any election, and upon which alone he claimed that right. It is not like the case where one who is entitled to an advantage proposes to waive it, and the other party acts upon the waiver — there the person mak-

ing the offer ought to be bound by it. The plaintiff here claimed the whole $1,500 of principal and the entire interest or that sum, from the date of the mortgage, grounding that claim upon the alleged default in paying interest. If the defendant had acceded to this view, and had paid or tendered the whole principal and interest, the plaintiff might have been obliged to take it, and his refusal of a full tender would probably have extinguished the lien. But the defendant did no such thing. He denied that there was any interest in arrear, and, virtually claimed that no occasion had arisen enabling the plaintiff to accelerate the payment of principal at his option; but he at the same time wished to hold the plaintiff to his offer, so far as it embraced the idea that the whole principal was payable, and accordingly tenders the balance, and it being refused, he claims that he is discharged from any obligation to pay anything. This is a very different thing from accepting an offer in the terms or spirit in which it is made.

It is not probable that the plaintiff refused the tender on the ground that he would prefer to keep his money upon interest until the expiration of the original time of credit; no doubt he refused it because he believed the alleged payment was a matter by which he was not bound, and because the whole principal and interest were not tendered. But that is no consequence. It is very plain that the defendant had no right to tender an amount of principal which had not become payable, and the plaintiff was under no obligation to give any reason for refusing it. It is hard enough for a mortgage creditor to lose his debt because he has been mistaken as to the effect of a payment of a small part of the amount, and has refused a tender of what the debtor claimed, and has been enabled to establish, was the full sum due. He should not, in my opinion, incur this forfeiture in a case in which the debt tendered had not fallen due. The plaintiff is sufficiently punished for his mistake, or the mistake of his legal advisers, when he is turned out of court with costs, for insisting upon a case which he could not sustain. The court had no right to go further and pronounce a forfeiture

of the debt confessedly owing, and which would not become payable in nearly a year from the time of the tender. Hence, I am in favor of modifying the judgment appealed from by striking out all that portion thereof which follows the award of costs against the plaintiff, and of inserting in the place thereof, as follows: "But it is further adjudged that the tender, mentioned in the answer and in the proof, did not have the effect to extinguish the lien of the said mortgage as to the refusal of the moneys secured thereby, over and above the sum of $490.03, found by the Supreme Court to have been paid thereon, and that the said bond and mortgage remains in full force as to the paid residue of the said mortgage debt."

If this modification is agreed to by the judges, there ought to be no costs against either party in this appeal.

JOHNSON, J. Upon the facts established by the findings, this appears to be a very plain case. The plaintiff became the owner of the bond and mortgage in question on the 13th of May 1862, by assignment from the mortgagee. As assignee he took subject to all equities existing at the time of the assignment, in favor of the debtor against his assignor. Any demand which the debtor might then have applied or set off against the assignor, he may have applied or set off against the assignee. This principal is so well settled that it would be a waste of time and labor to cite authorities in its support. At the date of the assignment, the defendant Tatham, was, in equity if not in law, in respect to this bond and mortgage, the principal debtor, he having on the 26th day of January previous taken a conveyance of the mortgaged premises, subject to the same mortgage. This conveyance was made to the defendant Tatham, at the instance and for the benefit of Alfred A. Arment who was the equitable though not the legal owner of the premises, and who had as such become liable to pay said bond and mortgage. The fall previous to this, Arment made an agreement with the plaintiff's assignor to do certain work for the latter in the Beekman Hill Chapel, which was then being built on the grounds of such assignor,

and that the amount of such work and labor should be applied in payment upon, and deducted from the amount of said bond and mortgage. This labor had been performed and the amount and value, $490.03, agreed upon between Arment and the assignor, and the account with right of application assigned to the defendant Tatham, before the assignment to the plaintiff of the bond and mortgage. This account Arment had agreed to assign to Tatham at the time the conveyance was made to the latter, and the assignment was actually made on the 3d of May 1862, ten days before the assignment of the bond and mortgage to the plaintiff. It will be seen therefore, that before the bond and mortgage had been assigned to the plaintiff, the right of the defendant Tatham to have this amount of $490,03 applied in payment and satisfaction of the mortgage debt had become fixed and vested. The payment had been made in labor performed upon an agreement that it should apply in that way, and nothing remained to be done to complete it, except perhaps to indorse the amount and receipt it as a payment. As the amount has actually been paid in services rendered, equity will regard it as actually applied according to the agreement. It will hold it to have been a payment *pro tanto* in fulfillment of the agreement and the intention. I am of the opinion also that the moment the work was completed under the agreement and the amount ascertained and agreed upon, the law would make the application as a payment and satisfaction *pro tanto*. (*Davis* v. *Spencer*, 24 N. Y., 386, 391.) This amount of $490,03 was not a latent equity in the hands of a third person, either at the time of the assignment to the plaintiff, or at any other time, and no such question arises in the case.

In any view of the case it is entirely clear that the plaintiff could only enforce the bond and mortgage for the amount due over and above this $490.03 as against the defendant, Tatham, who insisted upon its application as a payment. Consequently it was only necessary for him to tender the balance over and above this sum, with the costs which had then accrued. The plaintiff had elected to consider the whole debt due, as he had the right to do, upon the mere

payment of interest for the period specified. The tender or offer of payment of the whole amount remaining due, and for which the mortgage could be enforced, discharged the lien of the mortgage and operated to defeat the action to foreclose. (*Kortright* v. *Cady*, 21 N. Y., 343.)

It is strenuously contended by the appellant's counsel that the defendant, Tatham, is estopped by his deed from insisting upon the application of this amount for the work and labor to the mortgage debt. It is argued that having taken his deed subject to the mortgage he can set up nothing against it, but must pay the full amount for which it was given. But no case has been cited, and I think none can be found making any such application of the principle of estoppel by deed. By taking the conveyance of the premises subject to a mortgage the grantee is precluded from setting up the defense of usury against the mortgage (*Sands* v. *Church*, 6 N. Y., 347; *Shufelt* v. *Shufelt*, 9 Paige, 137); and such a grantee would, I suppose be estopped from denying the fact of the existence of such a mortgage as against the grantor and his assignees and representatives. (*Torrey* v. *Bank of Orleans*, 9 Paige, 649; *Denn* v. *Cornell*, 3 Johns. Cases, 174.) But no such question arises here. The existence of the mortgage is conceded, and its validity, to the extent of the amount justly due upon it. And there is nothing, either in the terms of the grant or in the principles of equity, to estop the grantee from showing what amount has been paid and what amount still remains due. Certainly he was not estopped as against Dunscomb, and should not be as against his assignee, whose duty it was to ascertain before taking the mortgage what claims there were existing against it. He was bound to inquire, and the law will hold him to the knowledge he should have acquired.

The judgment is right and should be affirmed.

All concur except WRIGHT, J.

Judgment affirmed.

JONAS CONKLING and THEODORE H. CONKLING v. JAMES R. GANDALL impleaded with GEORGE L. BURDICK and CHAS. FINN.

The mere fact of indorsement of negotiable paper gives no right of action against the indorser. His contract is conditional, and depends on facts outside the written instrument.

His promise to pay is conditioned that the holder shall present the note for payment; and if payment is refused, notice shall be given to him at the time and in the manner required by law.

Facts necessary to be proved to sustain an action, must be stated in the complaint as giving a cause of action.

The meaning of section 162 of the Code commented upon by WRIGHT, J.

APPEAL from judgment of Supreme Court. The action was against Burdick, Finn and Gandall. The complaint averred that the defendants, Burdick and Finn, made their certain copartnership promissory note in the words and figures following, that is to say:

"Fort Edward, *July* 11*th*, 1858.

"$256.58. Four months after date, for value received, we promise to pay to the order of J. K. Gandall, two hundred and fifty-six dollars and fifty-eight cents, at the Bank of Fort Edward, with interest. BURDICK & FINN."

The said note was indorsed as follows:

"J. R. Gandall, Salem, Washington Co., N. Y."

That such indorsement was so made by the above named defendant, James R. Gandall.

That the said plaintiffs are now the owners and holders of the said promissory note, and that the whole amount thereof, with interest, is due from the said defendants thereupon. Wherefore the said plaintiffs demand judgment, etc.

The defendants, Burdick and Finn, did not appear in the action. The defendant, Gandall, demurred to the complaint on the grounds:

1. Defect of parties defendant, in that Gandall is improperly made a party defendant. 2. The complaint does not state facts sufficient to constitute a cause of action. 3. The complaint does not aver presentment of said note for

payment, demand or refusal, or protest, or notice to defendant Gandall.

The Special Term overruled the demurrer, with leave for the defendant to answer on payment of costs. Gandall appealed to the General Term from the order, where the same was affirmed. Judgment having been entered against him, he appeals to this court.

O. L. Stewart, for the plaintiffs.

L. H. Northrup, for the defendant Gandall.

WRIGHT, J. This judgment, I think, cannot be sustained. A complaint, under the Code, must contain "a plain and concise statement of the facts constituting a cause of action" (Code, § 142), and it may be demurred to if it does not. (§ 144.) No cause of action was stated against the defendant Gandall. The only allegation affecting him is, that he indorsed a promissory note for $256.58, made by the firm of Burdick & Finn, payable to his order at the bank of Fort Edward, four months after date, which the plaintiffs own and hold. This is not stating a cause of action against an indorser. The mere fact of indorsement of a negotiable promissory note gives no right of action or entitles the holder to recover against the indorser. Without resorting to the contract of the indorser, which the law implies, the indorsement of such a note is nothing but an order upon the maker to pay its contents to the lawful holder. Such a note, although indorsed, contains no promise to pay on the part of the person indorsing it. His contract is conditional, not absolute, and depends on facts outside of the written instrument. He promises to pay only on condition that the holder shall present the note for payment, and if payment is refused notice shall be given to him at the time and in the manner required by law. This demand of payment and notice of dishonor, or facts by which they are excused, must be proved on the trial to establish his liability, and facts thus necessary to be proved, as they constitute in part the cause of action, must be averred in the complaint.

The complaint, therefore, as against the appellant Gandall, was insufficient and bad on demurrer, unless the requirements of section 162 are dispensed with by another section of the Code.

It is provided in section 162, chapter 5, of the Code entitled "General rules of pleading" that "in an action or defense, founded upon an instrument for the payment of money only, it shall be sufficient for the party to give a copy of the instrument, and to state that there is due to him thereon from the adverse party, a specified sum which he claims." The precise intention of the legislature, or the framers of the Code by this provision, is not clear, but certainly it was not meant that a complaint should be good, that merely set forth a copy of the instrument, with a statement that there was due to the plaintiff thereon, from the person named as a defendant, a specific sum, without averring that the defendant executed or delivered the instrument, or that it belonged to the plaintiff or in any way averring the defendant's liability or the plaintiff's title. Such a mode of pleading would be so loose, vague and indefinite, that it is not to be assumed that the legislature intended to sanction it. This, however, would follow if the clause is not to be read in connection with section 142 but construed alone and *strictly*. How are issues to be formed under such a complaint or one dispensing with the requirements of section 142? Take the present case. The instrument is a promissory note; three parties are impleaded as defendants; a copy of the instrument is given accompanied by a statement that there is due thereon, from the persons named as defendants, a specified sum which the plaintiff claims, and there is nothing more. The defendants may interpose by answer a denial, but what issue or issues will be thereby framed? There is but a single fact alleged and that in the most general form upon which an issue can be taken, viz., that there is due from the defendants to the plaintiffs, upon the instrument the sum named. By denying this would it put in issue the making of the note by Burdick and Finn as copartners and the plaintiff's title to it? Manifestly not. Nor did the pleader in this

case so understand it. It is averred that Burdick and Finn made the note as copartners, a copy of which is set out; that the defendant Gandall indorsed it, and that the plaintiffs are the owners and holders; all of which was unnecessary if the provisions of section 142 are dispensed with by section 162, where the "action is founded upon an instrument for the payment of money only." Although the intended purpose of the last clause of section 162 is not clear, I am inclined to the opinion that it was meant that where the action or defense was founded upon an instrument for the payment of money only, instead of setting forth the instrument according to its legal effect in the body of the complaint or answer, it should be sufficient for the party to give a copy of it. Be this, however, as it may, it is too improbable to suppose that it was intended in any class of actions, that a complaint should be good, that did not upon its face either by direct averment, or by giving a copy of the instrument upon which the action was founded, with allegations connecting the parties with it or unitedly showing a cause of action; or which did not contain material allegations to that end, or upon which issues might be taken; or if not taken, judgment would legally pass against the impleaded parties by default. In this case the instrument (a copy of which is given) purports to be for the payment of money, but without the averment that it was made by Burdick and Finn, named as defendants, as co-partners, and the plaintiffs' title to it appears in some way (neither of which facts is to be implied from the instrument itself) there would be no statement of a cause of action by the plaintiff against them. There is certainly no cause of action shown, where the facts upon which a plaintiff grounds his right to recover against a party, whom he may choose to implead as a defendant, do not affirmatively, or by implication, appear upon the face of the pleadings.

Beyond question, the complaint we are considering was sufficient against the defendants, Burdick and Finn. Their liability and the plaintiff's title appear affirmatively or by implication in the pleading. It is alleged that as copartners

they made a certain promissory note, of which a copy is given, instead of stating the legal effect of the instrument; and that the plaintiffs are the owners and holders thereof, and that the whole amount is due. Nothing more was required. The instrument itself declares the liability of its makers. It contains an absolute promise of the makers to pay a sum of money, to its lawful holder, at the time specified. There are no conditions to the promise. The instrument is evidence of the amount of the debt, and the effluxion of time by its terms fixes their liability. If the plaintiffs have title to the note at its maturity they are the parties to whom the obligation of absolute payment is due. By proof on the trial of the making of the note by the firm, and the plaintiffs' title to it, their right to recover as against the makers is established. But it is not so as against the defendant Gandall. Alleging and proving simply that he indorsed a note payable to his order would create no liability on his part to the holder. The law implies no contract to pay absolutely from the mere indorsement of a negotiable promissory note. Gandall's indorsement is averred in this complaint, and nothing more affecting him. If this fact had been put in issue and proved on the trial the plaintiffs would not have been entitled to recover against him. His promise is conditional, and his liability depends upon facts outside of the instrument on which his indorsement is made. An action as against him is founded on something more than an instrument for the payment of money only, even though it should be considered that section 162 of the Code would embrace the case of the makers of a promissory note, whose promise is contained in civil contract evidenced by the instrument itself. Payment of the note must be first properly demanded by the makers, and due notice given to the indorser before any legal liability attaches to the latter. A complaint that does not aver facts, entitling the plaintiff to recover against a party, and they do not appear in the instrument set forth or to be implied therefrom, must be defective. If it be necessary as against an indorser (which it unquestionably is) to establish his liability, to prove a demand of payment and

notice of dishonor of the note, it is incumbent upon the pleader to state these facts, otherwise the cause of action is defectively stated.

Whatever, therefore, may have been the legislative purpose in the enactment of section 162, it was not intended to include the case of a party whose liability was not absolutely fixed by and expressed in the instrument, but depended for its ever attaching on conditions precedent. Nor do I think in any case, even in that of the makers of a promissory note, the effect of the section is to dispense with the requirements of section 142. A complaint that did not cover the making of a promissory note, of which a copy was given by the persons sought to be charged as makers, nor showed that the plaintiff was the owner and holder, would in my judgment be bad on demurrer. If this were not so, the system of pleading inaugurated by this Code would be immeasurably more vague and indefinite than that which it assumed to supplant.

The judgment should be reversed.

INGRAHAM, J. Since the case of *Keteltas* v. *Myers* (19 N. Y., 231), I have considered the law as settled, that in an action upon a promissory note or other instrument for the payment of money solely, it was sufficient in the complaint to give a copy of the note, and state that there is due to the plaintiff, from any party to the note, the sum due thereon. To answer this complaint, a simple denial of indebtedness would be sufficient to put in issue everything connected with the note and claim, unless, perhaps, the execution of the note.

The case of *Prindle* v. *Caruthers* (15 N. Y., 425) held this doctrine upon an instrument for the payment of money other than a note. In that case no cause of action under the ordinary rules of pleading, was stated in the complaint. The court say, "The complaint implies that the plaintiff owns the instrument in some legal way, and that the event has happened on which the payment depends." The same rule, applied to this case, would imply that the defendant indorsed the note, that the note had become payable, and had been duly protested by which the defendant became indebted upon

the note, so that the event has happened upon which the payment depends. I see no more necessity of averring demand of payment, and notice to an indorser under this section of the Code, than to aver a demand of payment at a bank where the note is so payable, to charge the maker. Such a demand, in both cases would be necessarily averred in an ordinary pleading.

The necessity for such a mode of pleading in regard to liability of indorsers upon notes had been dispensed with before the Code, and quite as loose a style of pleading introduced when a plaintiff was allowed to sue makers and indorsers together under the money counts, and indorse a copy of the note upon the pleadings.

It was never held or suggested then that there must be an averment of demand and notice to hold an indorser liable under such a pleading. That statute provided that the plaintiff in any action on promissory notes may deduce upon the money counts alone, and the note be given in evidence where a copy had been served as to all the parties. (2 R. S., p. 276, 2d ed.)

The evident intent of the authors of the Code was to apply the same rules of pleading to actions upon notes brought under the Code, excepting that in lieu of allowing the money counts to be used, as that system of pleading was abolished, they substituting a more simple allegation of indebtedness with a copy of the note, to be substituted for it. This mode of pleading is just as appropriate to an indorser as a maker, and there is no more reason why an indorser should not be sued in this way than the maker. I do not see how any force can be given to that section of the Code, except by applying it to all the parties to a note with the same effect.

The judgment should be affirmed.

Judgment reversed.

JOHNSON LITTLE, Administrator, etc., Appellant, v. ALFRED DENN, Respondent.

The question of a right of way, either public or private is a question of title to real estate which a justice of the peace has no jurisdiction to try: per JOHNSON, J.

Where the plaintiff sues before a justice for an obstruction of the highway, if the defendant desires to raise the question of title, or right of way, he should, at the time of answering, have delivered to the justice the undertaking prescribed by section 56 of the Code. Having failed to do that, he cannot afterward question the existence of the highway.

But the defendant may, by proper evidence, show the established boundaries of the highway, for the purpose of showing that the alleged obstruction was not within such boundaries. To entitle the plaintiff to recover in such action, he must prove the existence of the highway by other evidence than the mere user by the public for the term of one year.

The question of encroachment upon the highway, may be determined without involving the question of title—it may be simply a question of boundary.

THE action was brought in a justice's court by the plaintiff as commissioner of highways of the town of Baldwin, in the county of Chemung, to recover a penalty of five dollars for obstructing a highway, under 1 R. S., 521, § 202. The complaint alleged that the highway was duly laid out in the year 1852, and that after it was laid out, opened, marked, used, and traveled, the deponent, on or about the years 1856 and 1857 built a fence across it and entirely obstructed it, and that he kept up and continued such obstruction. The defendant denied each and every allegation of the complaint, and denied that any road was ever laid out or marked, and alleged that if any steps had been taken to lay out a road they were irregular and void and contrary to the statute. He also alleged, in his answer, that the road alleged by the plaintiff to have been laid out, opened and used was afterward altered by the commissioner of highways, so as to authorize the location of the defendant's fence as it was located. The defendant did not give or offer any security as required by section 56 of the Code, where title to real property comes in question in the action. Issue was joined on the 30th

of August, 1858, and the cause was tried before the justice and a jury on the 24th of September, 1858. On the trial, the plaintiff proved by one witness that there was a road running on the line between the defendant's farm and the adjoining farm, part of the way, and part of the way wholly on the defendant's farm, which was traveled by the public, and while it was so being used by the public, he was ordered by the defendant to haul logs into it, and did so, and the defendant built a fence across the road so as entirely to obstruct the travel, which obstruction still remained. On his cross-examination, the witness testified, that it had been traveled about a year before it was fenced up by the defendant, and was fenced up the next fall after it was cut open. It appeared that the road had been opened through the woods, and the defendant cleared up to it and fenced across it. The plaintiff offered no evidence that it had ever been laid out as a highway, and there was no evidence to show that it had been used by the public over one year, when it was obstructed by the defendant. When the plaintiff rested, the defendant moved for a nonsuit, on the ground that the plaintiff had not shown the existence of any highway, either by user or any act of public authority.

The motion was denied, and the defendant excepted.

The defendant then offered in evidence the order of the commissioner of highways, laying out the road in question for the purpose of showing that by the courses and distances and location, the obstruction complained of was not in any part of the highway. This was objected to by the plaintiff on the grounds: 1. That such proof raises and draws in question the title to land. 2. That the court could not try the question whether the road was or was not laid out by the commissioners, but only the question whether the road was used as a highway. 3. That the defendant had admitted the existence of the highway as alleged, by not pleading title. 4. That the evidence offered was immaterial. The justice sustained the objection and excluded the evidence, and the defendant excepted. The defendant then offered the making and filing of an order laying out said highway, for the

purpose of showing that it was a laid out highway, and not one established by public use merely; and also for the purpose of showing that it was void, for the reason that no courses and distances were contained in it. This was objected to for the same reason as the other, and was excluded. The jury found a verdict in favor of the plaintiff. On appeal by the defendant, to the county court of Chemung county, the judgment in the justice's court was reversed. The plaintiff thereupon appealed to the Supreme Court, where the judgment of the county court was affirmed, and he now brings his appeal to this court. The case here is submitted on printed briefs and points.

E. H. Benn, for the appellant.

J. Herron, for the respondent.

JOHNSON, J. It is well settled that the question of a right of way, either public or private, is a question of title to real property which a justice of the peace has no jurisdiction to try. (*Randall* v. *Crandall*, 1 Hill, 342, and cases cited.) There is no question in respect to the jurisdiction of the justice to try and determine the action. If the defendant had wished to raise that question he should, at the time of answering, have delivered to the justice the written undertaking prescribed by section 56 of the Code. Not having done so, he was precluded from drawing the title, or right of way, in question in his defense. (Code, § 58.) Unless it was made to appear by the plaintiff's own showing that the right and title of the public to the highway was in question, it was the duty of the justice to proceed with and render judgment. The plaintiff proved that there was a road along the line of the plaintiff's premises, and part of the way across them, which was opened and used by the public, and that the defendant built a fence entirely across it, so as to shut out completely all travel. Upon the cross-examination of the plaintiff's witness by the defendant, it appeared that the road had only been opened and traveled about a year when it was thus obstructed. Was this, under the circumstances,

sufficient evidence to prove that the defendant had obstructed a highway? The public were then using it as a highway, and the defendant was precluded from raising the question of right to a highway on his premises if the evidence was sufficient to establish the public right *prima facie*. The defendant had not admitted either that it was a highway, or that he had obstructed it, by omitting to deliver the undertaking. But he was not at liberty to raise any question in regard to the public right if the plaintiff gave any evidence tending to show that it was a highway. The plaintiff, undoubtedly, to entitle himself to recover, was obliged to give evidence not only of the obstruction, but that it was in a highway also. And this, it is claimed, he did, *prima facie*, when he showed that it was a road the public had used as a highway a year or more. But this did not prove that it was a highway by user, nor tend to prove it. The right by user is only made out by evidence of use and occupation twenty years or more. Nothing short of that will answer, and, as the plaintiff gave no evidence of its being a laid out highway under the statute, there was nothing to show that any public right had been encroached upon, and the plaintiff should, I think, have been nonsuited.

But conceding that the evidence was, *prima facie*, sufficient to establish some right in the public, the defendant most clearly was entitled to show in what manner it was acquired, and if it was by proceedings under the statute, to introduce the order laying out the highway in question, for the purpose of showing that the alleged obstruction was not within the bounds of the highway. That was the only purpose for which it was offered by the first offer. I do not see why the evidence was not competent for that purpose. In that view and for that purpose the order did not draw the title of the public in question but conceded it, and merely raised the question of boundary. In actions of this kind there can be no doubt, I think, that the question whether the alleged obstruction is within the bounds of the highway, is always open to proof by the defendant. It is a question which does not properly involve title, but is entirely distinct

and separate from it. It admits title and seeks only to define and fix the boundaries. This was so held in *Fleet* v. *Youngs* (7 Wend., 291, 299). The court say the question of encroachment may be determined without an investigation of the title, "the question was, where was the boundary of the road, not who owned the land." The road was shown to have been upon the defendant's land, and it would be strange indeed if he could be rightfully precluded from showing its limits and boundaries. The law is not so unreasonable as to presume that a public highway is without definite boundaries, or that it embraces an entire farm, and in a case where he cannot dispute the right to a highway, will allow the owner of the land, for his own protection, to show where the right is located by way of defense. The plaintiff might clearly have introduced the order in evidence and that would have shown where the highway was located through the defendant's land. But he preferred to resort to, and rest upon, other evidence of an inferior character. But this did not affect the rights of the defendant when he entered upon his defense. He was then entitled to show, if he could, where the highway, to which the people had an undisputed right, was, and that he had not obstructed it, but had built the fence alleged to be an obstruction on some other part of his land. This question the justice was clearly competent to try, being a question of boundary lines merely, and not one of title to land. I am of the opinion, therefore, that the judgment of the Supreme Court was right and should be affirmed.

JANE STEBBINS and another v. MATTHIAS HOWELL.

Where defendant by fraudulent representation procured plaintiffs to release their mortgage lien upon certain premises, and before discovery of the fraud the title to said premises had been so conveyed that the lien could not be restored, the plaintiffs will be entitled to judgment against the defendant for the amount of the lien so released.

THE plaintiffs held a mortgage given in February, 1856, for $5,500, on two building lots in the city of New York. In March, 1857, certain parties who had become owners in fee of the mortgaged premises contracted to sell the lots to the defendant, Howell, he agreeing to erect a dwelling-house on each lot, of a description given in such agreement and to complete the same by the 1st day of March, 1858. Howell was entitled to a deed of the premises when the houses were inclosed on paying the purchase-money less the plaintiffs' mortgage; and the deed was to contain a clause binding and subjecting Howell to the payment of the incumbrance. Howell commenced immediately to build the houses under the agreement. In August 1857, while the houses were in process of construction, and had become inclosed, Howell, by representing to the plaintiffs that he was the owner of these lots, and that he desired to have them release the mortgage lien on one of these lots and loan him the further sum of $1,000 on the remaining lot, he procured them to release the said mortgage lien on one of the lots, and after obtaining said release and procuring the same to be recorded, he refused to take the loan and give the security promised. The representations of the said Howell in respect to his ownership of the said lots was false, and he acted in bad faith in procuring the release of the mortgage lien upon said lot. The plaintiffs on discovering the fraud of Howell, commenced their action against him, setting forth in their complaint the above facts, and also, that the said Howell was not the owner in fee of either of said lots, but only the holder of an agreement for the purchase and sale of the same. That the fee in the remaining lot was in one

Browning, subject to the agreement for purchase, held by Howell; the said Browning was made a party defendant. That the interest of Browning in said lot was about $1,600. That plaintiffs had applied to Browning for his consent in writing to have the whole amount due on the mortgage charged upon said lot, the fee of which was in him. But he refused to consent to the same. The plaintiffs, among other things, pray for an injunction against Howell and Browning and each of them, restraining them from conveying, or in any manner incumbering the said lots of ground or any portion thereof. The plaintiffs also prayed that Howell should be directed to restore the said mortgage lien upon said lot; or that he should be desired to pay to the plaintiffs the sum of $2,750 and interest, as the consideration of the release of the mortgage lien, thus fraudulently obtained by him. The prayer for injunction was granted.

At the Special Term of the Supreme Court in the first district, held in June, 1858, the judge found the above facts as to the rights of the plaintiffs, and the fraudulent conduct of the defendant, Howell, and found as a conclusion of law, that the plaintiffs were entitled to payment by the defendant Howell, of the sum of $2,750, being one-half the amount due upon said mortgage, with interest from the 26th September, 1857, and judgment was rendered for the same and for costs against the defendant Howell. Howell appealed to the General Term where the judgment of the Special Term was affirmed, and he now appeals to this court.

John P. Crosby, for the respondents.

Solomon L. Hull, for the appellant.

WRIGHT, J. The case is this. The plaintiffs held a mortgage, given in February, 1856, for $5,500, on two building lots in the city of New York. In March, 1857, certain parties who had became the owners in fee of the mortgaged premises contracted to sell the lots to the defendant Howell, he agreeing to erect a dwelling-house on each lot, of a definite description, and complete the same by the first of March, 1858. Howell

was to be entitled to a deed of the premises when the houses were inclosed on paying the purchase-money, less the plaintiffs' mortgage; and the deed was to contain a clause subjecting and binding him to the payment of the incumbrance. Howell commenced forthwith to build the houses under the agreement. In August, 1857, while the houses were being built, and were inclosed, by a fraud of Howell or bad faith on his part, the plaintiffs lost the lien of their mortgage on one of the lots, and the other may or may not be ample security for the sum of $5,500. It certainly is not without the building on it. But whether it is or not is of no consequence whatever. Howell paid nothing for the release of the lien of the plaintiffs' mortgage, and never had any right to it, except upon his performing in good faith the contract in pursuance of which the delivery of the release was anticipated. In August, 1857, representing himself to the plaintiffs to be the owner of both lots, when in fact, he had the title to neither, he applied to them to release the mortgage lien on one of the lots, and lend him an additional sum on the remaining lot. It was agreed to release the lien on one lot and loan him the further sum of $1,000 which was afterward extended to $1,500 on the other lot. Of course the lease and the additional loan were intended to be simultaneous transactions; and the agreement for both was manifestly based on the supposition that Howell was the owner of the whole mortgaged premises. Otherwise the release of one-half of the premises from the operation of the mortgage was without any consideration whatever, and the plaintiffs were placed in jeopardy of a loss of one-half their mortgage debt. The agreement was not immediately consummated, and in the meanwhile, under the pretense that he would carry it out, and the plaintiffs relying on his good faith, Howell obtained the release, and afterward persistently declined to perform on his part, although there was no difficulty in his doing so. It turned out that he had but an equitable interest in the lot not released, but was entitled to a deed of the same on the payment of $1,500—the exact amount which the new loan would have extinguished had the agreement been carried

out, and the party holding the fee was ready and willing to execute such conveyance to him on receiving that sum. After procuring the release, however, and having it recorded, he refused to proceed any further in consummating the agreement, and giving as the reason for non-performance on his part, that the money was not forthcoming from the plaintiffs when he wanted it; that the time had gone by for selling the houses on the lots, and he would have to pay the interest and taxes on the lot not released from the lien of the mortgage, which, as between him and the person holding the title, the latter ought to pay.

It seems to me to require but a simple statement of the case to show the correctness of the judgment of the court below. The defendant, Howell, having obtained the release, if not under false pretenses and misrepresentations, or concealment of the truth, yet without any consideration, and without carrying out the arrrangement into which he had expressly entered, should be compelled to restore the plaintiffs to their former conditions as to the security. It is no answer whatever to him that, as that part of the mortgaged premises with the building thereon is worth double the sum secured by the plaintiffs' mortgage, no damage could result to them by his surreptitiously obtaining a release of one-half the mortgaged premises. The value of their security is lessened one-half, and to that extent by the defendant's fraud or bad faith they are put in jeopardy of loss. As the release could not be recalled, and that part of the mortgaged premises released was of equal value with what remains subject to the lien, the only equitable mode of restoring the plaintiffs to their original condition as their security, was that adopted.

The judgment should be affirmed.

Concurring, MULLIN, JOHNSON, DAVIES and INGRAHAM, JJ.

HOGEBOOM, J., read for modification. DENIO, Ch. J., did not vote.

Judgment affirmed.

HOGEBOOM, J. On the 17th day of July, 1857, the plaintiffs were the owners of a bond and mortgage made by

Elkanah Isaacs, dated February 25th, 1856, on which there was remaining due the sum of $5,500.

This mortgage was the first lien on two lots in Eleventh street, in the city of New York, numbered 4 and 5 on the diagram on page 12 of the case. The defendant, Howell, erected on each of said lots, houses; and, pursuant to the agreement proved in the case, was entitled to a conveyance of No. 4 from Richard Lawrence, who held the fee; and was entitled to a conveyance of No. 5 from Theodore Browning, on paying $1,500 to said Browning.

The house and lot No. 5 was worth, as the court below found, at least $14,000. The plaintiffs about the 8th of August, 1857, at defendant's (Howell), request, to release the house and lot No. 4 from their mortgage and hold the whole amount thereof against No. 5; and, in addition, to loan thereon the further sum of $1,000 which was afterward agreed should be $1,500 instead of $1,000; thus making, if the arrangement was carried out, plaintiffs' mortgages on No. 5, $7,000.

The plaintiffs executed and delivered to defendant, Howell, the release of No. 4 from said mortgage, and thereupon Howell immediately executed and delivered to the Resolute Fire Insurance Company a mortgage upon the house and lot so released to secure the payment of $6,500 loaned by them. At the time of executing and delivering said release, the plaintiffs supposed said Howell held the fee of both No. 4 and No. 5, they never having had any notice to the contrary.

As a matter of fact, the fee of No. 4 was then held by said Lawrence, and the fee of No. 5 was held by said Browning, subject to said Howell's right to receive a conveyance as above mentioned. And at the time of receiving the release, said Howell transferred to plaintiffs a policy of insurance on house and lot No. 5, for $5,000, as security for their mortgage.

According to the findings of fact by the court, the additional loan of $1,500 was never consummated, by reason of the non-performance on the part of said Howell of his agreement, and he refused to take the money.

This led to an investigation of the title by the plaintiffs, and it was ascertained that Howell never had the legal title to the property in question. The plaintiffs then commenced this action, asking a cancellation of the release, a restoration of the lien of the mortgage over both lots (4 and 5) by the removal of the mortgage of the Resolute Fire Insurance Company, or the payment by Howell to the plaintiffs of $2,750, and interest, as the consideration of said release, being the portion of plaintiffs' mortgage which Howell assumed to pay in his purchase from Lawrence of lot No. 4, or that in default thereof the interest of Howell in the Lawrence lot be sold and the proceeds applied to the payment of said sum of $2,750 and interest, and if insufficient then that the Browning lot be sold, and out of the proceeds, the aforesaid deficiency and the amount due Browning be paid, the said sale to be subject to the payment of the remaining $2,750 and interest, due on the plaintiffs' mortgage. The cause was tried at Special Term in the city of New York, and that court gave judgment for $2,750 with interest and costs against the defendant, Howell (without other relief). On appeal by Howell to the General Term, the judgment was affirmed, and, thereupon, the defendant, Howell, appealed to this court.

The object of this suit seems to be to cancel a release executed by the plaintiffs to the defendant Howell, discharging lot No. 4, described in the pleadings, from the operation of a mortgage held by the plaintiffs to the amount of $5,500, and covering lots Nos. 4 and 5, and to restore the lien of said mortgage over both of said lots, or that said Howell pay to the plaintiffs $2,750, one-half of said mortgage, being the amount of said mortgage which said Howell agreed to assume or pay when he contracted to purchase said lot No. 4 from Richard Lawrence, the then owner thereof; and this last branch of the relief sought, to wit, the payment of the said $2,750 and interest, is the relief granted by the court which tried the cause, and whose judgment was affirmed at the General Term.

The ground upon which the plaintiffs founded their claim to this relief appears to be that holding this mortgage upon these two lots, executed by one Isaacs, a former owner thereof, they were applied to by Howell, whom they supposed to be the then owner of these lots, to release one of them (No. 4) from the operation of the mortgage, and to make an additional loan of $1,000, afterward increased to $1,500 on the remaining lot (No. 5), for which, with the dwelling-house erected thereon by Howell, it was claimed to be good security; that the plaintiffs consented to make this loan, and subsequently applied to Howell for the fulfillment of the contract, which he declined to make, and refused to take the money, and the plaintiffs thereupon instituting inquiries as to the state of the title, for the first time ascertained that Howell had not the legal title thereto, but only a contract for the purchase thereof from Browning, the other defendant, to whom there was owing some $1,500 of unpaid purchase-money, which was to be paid before he could be compelled to transfer the title to said lot. The plaintiffs allege that at the time of soliciting said release Howell represented himself as the *owner* of said lots, which Howell denies. The finding of the court upon this subject is "that when said release was delivered by said plaintiffs to said defendants they were ignorant of the fact that the fee of said lot No. 5, was held by said Browning, and had no notice of such fact from Howell, and were led to suppose by his silence, and by other acts, that he was the owner thereof." Immediately on receiving the release of the lot (No. 4) from the mortgage, Howell executed and delivered to the Resolute Insurance Company a mortgage thereon for $6,500, and there seems to be no attempt to dispute the validity or *bona fide* character of this lien, or its right to a preference over one-half of the plaintiffs' mortgage. At the same time, Howell executed and delivered to the plaintiffs a policy of insurance on the house upon the remaining lot (No. 5) for the sum of $5,000. This house and lot (No. 5) are found by the court to be worth at least $14,000, and to be ample security for the loan of $6,500.

The plaintiffs, therefore, claim that the release was obtained from them by fraud, or indirection, or false representations, and without consideration and that they are consequently entitled to the relief prayed for in the complaint. They cannot obtain that branch of the relief which seeks the cancellation of the release and the restoration of the mortgage, at least not to the extent prayed for in the complaint, because they have not made the Resolute Insurance Company a party to this action, nor sought to assail the apparent *bona fide* priority which they have obtained by loaning their money after the execution and probably upon the strength of the release, and they have therefore sought and obtained from the court below the other branch of relief prayed for, to wit, the payment of $2,750, with interest. There is some difficulty in saying that such relief is apposite to the case. We must assume, no doubt, for the court has so found, that the defendant Howell has violated his contract in not accepting the additional sum of $1,500 agreed to be loaned, and yet upon the theory now proposed by the plaintiffs they would have been in a worse situation by just that amount if they had in fact loaned to the defendant that sum. In another particular, according to the finding of the court below, the defendant Howell was in fault, to wit, in procuring the release of the lot in question from the mortgage and confining the lien of the mortgage to the remaining lot upon the faith of Howell's ownership of that property. It would seem, so far as I can understand the testimony, that the plaintiffs were willing to take security upon lot No. 5 to the whole amount of the $5,500 mortgage, and the additional $1,500 which they proposed to loan to the defendant Howell, provided Howell was the owner thereof, which Howell led them to believe, if he did not actually represent that he was.

It turned out that he was not the owner, or, if the equitable owner, that there was an equitable lien in favor of Browning which intervened between one half in amount of this mortgage ($2,750) and the remaining half and said sum of $1,500, and the question is to what relief, if any, are the plaintiffs entitled. They have lost their remedy against

the property released, or at least it is to be postponed to the mortgage of the Resolute Insurance Company, and perhaps this fact, more than any other, gives the clue to the relief to which the plaintiffs are entitled. They are entitled to preserve the lien of their mortgage intact against the lot not released (No. 5), that is, if it has not been impaired by the release of lot No. 4, which is a question as to the extent of contribution between the plaintiffs and Browning, which does not appear to be raised in the case, at least not on this appeal. They are entitled to have the lien of their mortgage restored upon lot No. 4 except as against the mortgage of the Resolute Insurance Company, and to have such interest as Howell had in the premises after the lien of such mortgage, sold on a foreclosure of their own mortgage, and if, on the foreclosure of mortgage of the plaintiffs, the mortgaged premises shall prove insufficient to pay the mortgage, I do not see why they would not be entitled to a decree against Howell, for the deficiency, on the ground that this was the legitimate and accurate measure of the damages they had sustained by the act of Howell in improperly procuring the release in question. And this seems to me the extent of the relief to which the plaintiffs are entitled. This is not an action for the foreclosure of the plaintiffs' mortgage. Indeed, the terms of it are not set forth so as to enable us to ascertain whether it is yet due. The relief, therefore, which the plaintiffs obtained at Special Term was not germane to the case and should be modified, I think, in accordance with the above suggestions. As the defendant was in fault, and denied altogether the plaintiffs' title to any relief, he was perhaps rightfully subjected to the costs of the original judgment. It is true the plaintiffs might have postponed their action against Howell, until their mortgage became due, and sought the relief for which they now apply in that action. But that course would have exposed the plaintiffs to the danger of losing their lien on lot No. 4 by a sale of those premises by Howell to a *bona fide* purchaser having no knowledge of plaintiffs' claim. I incline to think, therefore, he was justified in instituting an action to restore the lien

of his mortgage and at the same time to prevent, by injunction, the transfer or incumbering of the property until such lien was re-instated, and this is a portion of the relief in fact claimed by them in the complaint in this action.

I am for a modification of the judgment in accordance with these views.

ELLA E. B. WEHRKAMP v. JAMES S. WILLETT, Administrator of JAMES S. WILLETT, deceased, Sheriff, etc.

Where the husband and wife are parties to an action, the statute in terms makes them competent witnesses in their own behalf, or in behalf of any other party.

As such witnesses they are subject to the same rules of examination, except they are protected from being required to make disclosures of communications between themselves.

The only proper inquiry, on the direct examination of a witness, as to the character of another, is as to the general moral character of the latter, and his public reputation as a truthful or untruthful person. It is not permissible for the assailing party to show specific acts of immorality or misconduct, with the view of inpeaching or discrediting a person as a witness.

APPEAL from a judgment of New York Common Pleas. The action was brought by the plaintiff, a married woman, to recover the possession of certain personal property in carpets and paintings, alleged to belong to her, which was taken by the defendant's intestate, as sheriff of the city and county of New York, under an execution issued upon a judgment recovered in favor of one William L. Martine against her husband.

The case was tried in the New York Common Pleas, before his honor, Judge BRADY, in April, 1861, and the plaintiff had a verdict, the jury assessing the value of the property at $690. The sole question in issue was whether the plaintiff was the owner of the property, or whether the same belonged to her husband. The proof tended to establish ownership in the plaintiff; and there was no fact shown leading to a contrary conclusion except that, at the time the property was taken and sold, the plaintiff and her husband were living together as man and wife. The defense mainly consisted in an attempt to impeach the character and credibility of the plaintiff, who was sworn as a witness, and in showing that before her marriage, in September, 1854, and prior to her coming to this country, in 1853, from Denmark, of which she was a native, she was a woman of poor parentage and of immoral habits.

At the close of the plaintiff's testimony, the defendant moved for a nonsuit, which was refused and an exception taken. But this exception is not now urged. There was no exception to the charge of the judge, except in a single unimportant particular; and any exceptions open to review here related to the ruling, on the trial, as to the admission or exclusion of evidence. The exceptions were numerous, but most of them palpably frivolous. Those insisted upon as having any merit are to be noticed in the opinions.

A. R. Dyett, for the appellant.

C. Bainbridge Smith, for the respondent.

WRIGHT, J. The plaintiff was sworn as a witness in her own behalf; the defendant objecting to her examination, as the case states, on the ground that the action being under the sheriff's claim against the husband, it was substantially against him, and she could not be examined because her husband was so far interested in the case. The point of the objection is not clear, but if it has any meaning it is this, that the sheriff having taken and sold property under an execution against the plaintiff's husband, an action to test the title to such property is one substantially against him, and in which he is interested, and the law forbids husband and wife to testify either for or against each other. Regarding this as the substance of the objection there is no force in it.

The rule of the common law did not prohibit husband and wife from testifying in a civil action, unless one or the other, or both were parties, or directly interested in the subject of the action. Here the husband was not a party, nor had he any such interest as would have disqualified the wife by strict common law rules. The action was in no proper sense against him. He made no claim to the property taken and sold by the defendant, and had no interest in the litigation, unless, indeed, to have his debts paid from property to which he laid no claim. There was no conflict of interest between husband and wife; the latter claiming the property as her

own, and the former not disputing or gainsaying her rights to it. But had the husband been a party to the action, having any interest in the result, the plaintiff's competency would have been affected. The Code provides that a party to an action may be examined as a witness in his own behalf, or in behalf of any other party in the same manner, and subject to the same rules of examination as any other witness, except that neither husband nor wife shall be required to disclose any communication made by one to the other. (Code § 399, as amended in 1860; Laws of 1860, Chap. 459.) The letter of the statutes certainly extends to married persons when they are parties, not having conflicting interest, and the exception is a plain indication of the legislative intention to change or modify the common law rule as to the admissibility of husband and wife as witnesses. The reason of the latter rule for not admitting husband and wife as witnesses for each other was because of an identity of interest; nor against each other, because contrary to the legal policy of marriage. Husband and wife, says Blackstone, "are not allowed to be evidence for or against each other, partly because it is impossible that their testimony should be indifferent, but principally because of the union of persons, and, therefore, if they were admitted to be witnesses, for each other, they would contradict our maxim of law, no one shall be a witness in his own cause; and if against each other, they would contradict another maxim, no one is obliged to convict himself." (1 Bl. Com., 443.) "If they" (husband and wife), says Baron Gilbert, in his work on evidence (page 552), "swear for each other, they are not believed, because their interests are absolutely the same, and, therefore, they can give no more credit when they attest for each other, than when a man attests for himself, and it would be very hard if a wife should be allowed as evidence against her husband, when she cannot attest for him. Such a law would occasion implacable quarrels and divisions, and destroy the very legal policy of marriage." But of late years, in this State, material and radical changes have been made in the law of husband and wife, and in the law of evidence, and the competency and admissibility of

witnesses, undermining in a great degree the uses of, and practically abrogating the common law rule.

The wife has been admitted to separate rights of property, and to separate rights of action, even as against the husband himself. Interest in the event of the action is no longer a ground for excluding a witness, and the parties themselves may be witnesses in their own behalf, or witnesses in their own cause. Parties, with certain exceptions, are placed upon the same footing and subject to the same rules of examination as any other witnesses. There is no longer any reason for excluding husband and wife as witnesses for or against each other on the ground of interest, for as parties to an action they may be witnesses for themselves; and it was this ground of union of interest and privilege between husband and wife that mainly gave rise to the common law rule, excluding them from testifying for or against each other. Be this, however, as it may, the tendency and effect of legislation has been to abrogate the common law distinctions growing out of the marital relation in respect to the competency of witnesses; whether husband or wife are parties to, or interested in an action, they may be examined in the same manner and subject to the same rules of examination as any other witness, except that they shall not be required to disclose any confidential communication made to each other during marriage. If husband and wife are parties to an action, the statute in terms makes them competent witnesses in their own behalf, or in behalf of any other party, and subjects them to the same rules of examination as other witnesses, except protecting either from a disclosure of communications made by one to the other. The exception is strongly indicative of the legislative intention to render husband and wife, when parties, competent to testify as to all matters, other than communication made by the husband to the wife, or the wife to the husband. In the present case the action was brought by the wife for the conversion of her separate property. As the plaintiff, she could testify on her own behalf, and had the controversy been between her husband and a third person in respect to the property, I

entertain no doubt that she would have been a competent witness to show title in herself, and out of her husband, unless such title came through the latter.

The property consisted of Brussels carpeting and oil paintings, and the testimony of the plaintiff, if credited, clearly established her title to it. Indeed, all the evidence as to ownership was on the part of the plaintiff, and her own statement was materially contradicted by disinterested witnesses. The defendant's proof was mainly directed to an impeachment of the plaintiff and to lessening the value of the paintings. It appeared from her testimony in connection with the other witnesses that she was a native of Denmark, and lived with her parents until she was fourteen years of age. She then went to live with her aunt in Sweden, who was wealthy, and she was with the latter some six or seven years. Her aunt left her sick at Hamburg, in Germany, and went to Paris, and after her recovery she came to this country. She brought with her $1,000 in gold and nearly $2,000 worth of jewelry, given to her by her aunt, and also three paintings, "The King and Queen of Denmark," "The Sacrifice" and "The Aurora." She was supported in the fact of gold, costly jewelry and paintings when, in 1853, she embarked for this country, by a lady who knew her at Hamburg. On her arrival at New York she put up at the Hotel Constane, and the bookkeeper of the establishment testified to having seen in her possession some $500 or $600 in gold, and also much valuable jewelry. She was married in September, 1854, to W. Wehrkamp, who was a bookkeeper and a person without means, and neither at the time of marriage or since had been engaged in any business on his own account. Some three years after the marriage, the plaintiff and her husband went to Europe, but were absent but a short time. Seven of the paintings taken by the sheriff were purchased by the plaintiff from an English artist after her marriage, with her own means, and five small pieces she painted herself. She kept an account in her own name in the Bleecker street savings bank from March, 1855, to March, 1857, and while the account was running the teller testified that she spoke to

him of having paintings and jewelry which she desired to sell. In 1856 and 1857 she purchased the carpets in question from Doughty & Brother, who only knew her in the transaction. A short credit was given, and she paid for them with her own money. Of this carpeting there were over five hundred yards, worth at least one dollar per yard. It is true that the plaintiff and Wehrkamp were living together as husband and wife when the property was seized, but beyond this there was not a fact or circumstance in the case tending to show ownership in him or to disprove the plaintiff's ownership. Upon this proof it would have been error to have granted the motion to dismiss the complaint on the ground argued, viz., that there was not sufficient evidence that the property in question was the separate property of Mrs. Wehrkamp to entitle her to recover.

Many of the defendant's exceptions occur in the cross-examination of the plaintiff. Several of them were palpably frivolous, requiring no notice, and were not insisted upon in the argument, nor are any on which a point was made at bar tenable. The fact to which our attention was directed arose in this way: The defendant's counsel had got the witness to say that she recollected that a Mr. Carpenter had obtained a judgment against her husband. The question was then put to her, "Do you recollect asking Mr. Carpenter to loan that money—the money for which the judgment was obtained and the property taken?" This was objected to and excluded. Two or three other questions of a similar character followed, varying only in phraseology, which were also excluded. She was then inquired of, "Did you at any time say to Mr. Carpenter or in his presence that the paintings and carpets belonged to you and your husband and they will pay the debt?" This was allowed and answered. There was no error here. The questions excluded assumed facts not proved. There was nothing in the case to show that the property was taken to satisfy a judgment obtained by Carpenter against Wehrkamp for borrowed money. Free from this objection, and when the inquiry was put in form to throw light upon the issue whether she was the

owner of the property, it was allowed and answered. The defendant's counsel, however, was not satisfied, and persisted in the question, 1. "Did you tell Mr. Carpenter in November, 1857, that your husband was sick and wanted some money?" and, 2. "Do you recollect the fact of your husband borrowing money of Mr. Carpenter in November, 1857?" These were properly excluded. The fact of her husband borrowing money from Carpenter was wholly immaterial. At a subsequent stage of the trial the defendant's counsel returned to this course of irrelevant examination, but with no better success.

The plaintiff testified that she at one time loaned some of her money to a Mr. Jacobs, a friend of her husband who was then in New York; she did not know his christian name. The defendant's counsel then inquired, "Will you ask your husband, who is here in court, what Jacobs' first name was, and where he lived, so that I may ascertain who he is and where he lives? The court, on objection excluded the question arresting Collogeny with the witness, and the defendant excepted. This was plainly right. It would have been the duty of the court in the orderly conduct of the trial, irrespective of any formal objection, to have arrested such a course of examination. It was manifestly trifling with the dignity and wasting the time of the court by impertinent and irrelevant inquiries; unprofessional conduct of counsel.

It seems that the action had been once tried and the plaintiff had obtained a verdict. A new trial was granted, as it was alleged by the defendant's counsel, on the ground of newly discovered evidence. The plaintiff stated on her cross-examination on the present trial that she did not know the ground on which the new trial was granted and that she did not recollect of testifying on the first trial that she obtained credit from Doughty for one bill of carpeting because she had money in the savings bank, but if she so testified she misunderstood the question. At the close of the defendant's case his counsel offered to read the affidavits on which the motion for the new trial was made and in connection therewith to prove that they were served on the plaintiff's attorney, and that no affi-

davits were read on her part to contradict therein, with the view, as was stated, of showing, first, that the plaintiff swore falsely in stating that she was ignorant of the ground on which a new trial was granted, and second, that the new trial was moved for on the express ground that she had on the first trial sworn that she got credit from Doughty on one bill of carpeting because she had money in the savings bank. When the newly discovered evidence showed that she had no money there, and to argue to the jury from thence, that her statement, that she knows nothing of all this, and that she did not testify on the former trial as alleged, or if she did, she misunderstood the question, was a mere pretense. Of course the affidavits used on the part of the defendant in a collateral proceeding, were excluded, and properly so. If it were at all material or important to contradict the statement of the witness that she did not know on what ground the new trial was granted, it could not be done in this way, nor was the testimony permissible to enable the counsel, as was averred upon it, to hinge an address to the jury against the witness' credibility. The probabilities are, that being a foreigner, having an imperfect knowledge of our language or of the form and course of legal proceedings, she testified truly that she was ignorant of the ground on which the motion for a new trial was granted; but whether so or not, or if at all material, her testimony in this respect could not be falsified by showing that the affidavits of the defendant on the motion, alleged a certain ground, and no affidavits were read on the part of the plaintiff in contradiction of them; nor if it had been important to show that on the first trial she testified that she obtained credit for the bill of carpeting bought in May, 1857, because she had money in the savings bank, when in fact she had not, could it be shown by the affidavits of the defendants prepared for, and used in a collateral motion. The avowed purpose, however, of the offered testimony was not to show that the witness had testified untruly as to her knowledge of the ground on which a new trial was obtained, or in respect to any material fact on the first trial, but to enable counsel to argue to the jury, that

her statement that she knew not why the new trial was granted, or that she did not recollect of testifying on the former occasion, that she was credited for a bill of carpeting in May, 1857, because she had money in the savings bank, or if she so testified she misunderstood the inquiry, was a mere pretense. This was certainly a novel attempt to get before the jury impertinent and irrelevant testimony on which to base an assault upon the witness' credibility. The defendant offered no proof on the question of ownership of the property, but the main effort seems to have been to impeach the character and credit of the plaintiff. In this his counsel was indulged by the court in a wide latitude of examination, but apparently with indifferent success. None of her statements were shown to be untrue. Her reputation for truth, or her moral standing for eight years that she had resided in the city of New York, was not questioned. Two witnesses were produced who testified to having known her and her parents in Denmark; one of whom stated that prior to 1850 she was a prostitute in Copenhagen, and the other that he had danced with her many years ago in her native place at public balls and masquerades; that her general character or reputation then was bad, and that from what he had heard and knew of it in Copenhagen, he would not believe her under oath. The first of these witnesses was not interrogated as to her general moral character in her native place, or in Copenhagen, but was allowed, without objections, to testify generally to the fact that at some time before she came to this country she was a prostitute, and lived in a house of prostitution; although it appeared from his cross-examination that he testified from no personal knowledge, never having met or spoken to her but once in Copenhagen, and then by accident in the street; with respect to the other witness, after stating that he had danced with her at public balls and masquerades, the defendant's counsel propounded the question to him, "What was the character of the house in which the balls and masquerades were given?" This was objected to and excluded, and an exception taken. This was not error. The only proper inquiry on the direct examination of the witness was as to

her general, moral character and her public reputation as a truthful or untruthful women. It was not permissible for the defendant to show specified acts of immorality or misconduct with the view of impeaching or discrediting her as a witness. The character of the houses at which she attended balls and masquerades, was utterty immaterial except in its bearing on her moral reputation and habits.

These are all the exceptions supposed on the argument to be entitled to any consideration. Indeed, none of them were strenously urged, except that allowing the plaintiff to be examined as a witness on her own behalf.

The judgment of the Common Pleas should be affirmed.

All the judges concurring except MULLIN, J., who was for reversal on the grounds stated in the following opinion.

MULLIN, J. Had the verdict of the jury been for a much less sum than for which it was rendered, I should feel much better satisfied that injustice had not been done to the defendant and those he represented. But the court below has not seen fit to disturb the verdict, and we cannot, if we would, interfere with it, notwithstanding it might be satisfied that it was for much more than the plaintiff was entitled to recover. If the ruling on the trial was correct the judgment must stand, whatever errors may have been committed by the jury.

The first question presented for our consideration is, whether the plaintiff was a competent witness in her own behalf. The ground of the objection to her is, that the defendant asserts title to the property in controversy through a judgment recovered against the plaintiff's husband, and, therefore, the husband is substantially a party, and the wife cannot be examined as a witness against her husband.

At common law, neither the husband or the wife could be examined as a witness for or against each other, and this rule of exclusion was adopted because it was considered to be against public policy to compel persons occupying the relation of husband and wife to disclose the acts and sayings of

each, or to subject either to the prejudice or passion which would naturally arise against the one who should give evidence injurious to the interests or feelings of the other.

To this rule of exclusion there was but one exception, that neither might be a witness against the other in regard to personal injury done or threatened, and that the wife was a competent witness against the husband on the trial of an indictment for a forcible marriage, or for a conspiracy and fraudulent marriage. (2 Cow. & Hill's notes, 1554.) In all civil matters they were wholly incompetent to testify for or against each other. (Id., 1554.)

The Code has changed the common law rules of evidence in many very important particulars, among others by making the wife a competent witness against her husband in actions in respect to her separate property. By the act for the more effectual protection of married women passed, April 7, 1848, a married women was permitted to take by gift, devise, or bequest from any person other than her husband, and hold to her sole and separate use, convey and devise, real and personal property in the same manner as if she were unmarried.

It was provided by section 114 of the Code of Procedure, as it stood when this action was commenced, that where a married woman is a party her husband must be joined with her, except that when the action concerns her separate property, she might sue alone.

Thus, by section 399 of the Code, it was provided that a party to an action or special proceeding may be examined in his own behalf, or in behalf of any other in the same manner, and subject to the same rules of examination, as any other witnesses. The statute makes *every party* a competent witness—there is no exception, and the courts have no power to create exceptions to the operations of statutes unless the exception is necessary to prevent injustice, so obvious with the intention of the legislature, that it should be excluded.

The case of a married woman owning separate estate is not a case within any principle of exclusion. If it was wise and just that married women should have separate estates.

which they could hold, manage and dispose of as if they were unmarried, and that they might sue and be sued in relation to such estates, it is eqnally just and right that they should be able to be witnesses in their own behalf if all other persons were to be, or the right to hold property separately would be a curse rather than a boon.

The decisions of the court have not been uniform on this question, yet I think the weight of authority in the Supreme Court is in favor of holding the wife a competent witness. (*Shoemaker* v. *M'Kee* 19 How. Pr., 86; *Marsh* v. *Potter*, 30 Barb., 506; *Schaffner* v. *Renten*, 37 Barb., 44.)

In this court there is no reported decision on the question, that I have been able to find. In March, 1863, the case of *Marsh* v. *Potter*, cited *supra*, was approved by this court, and thus settling the question as to the competency of the wife.

The court below were right, therefore, in admitting the plaintiff to testify in her own behalf.

The plaintiff was asked by her counsel and by the court whether she was acquainted with the value of the pictures, and she replied, a little. She was then asked what was the value of "The Sacrifice," one of the number. This question was objected to by the defendant's counsel. The objection was overruled, and the defendant's counsel excepted. The counsel did not specify in his objection the ground on which he desired to have it excluded, and the only ground he can now rest upon is that a person a little acquainted with pictures, having painted some herself and bought others, was not competent to give an opinion as to value. It seems to me that she had shown herself competent to express an opinion upon the value, the weight that opinion was entitled to was for the jury. If the counsel had desired to have her capacity to form an opinion as to value further tested, he should have objected to allowing her to express an opinion until her competency was carefully shown. But he has contented himself with resting on the objection that on her evidence she was not shown capable of offering an opinion as to value, and as I have no doubt she was competent, his objection was properly overruled.

Several questions were put to this witness on cross-examination, by the defendant's counsel, as to whether, at the time her husband borrowed of Carpenter, the money for which the judgment was recovered on as an examination on which the property in controversy in the suit here was taken by the defendant and sold. She did not say to Carpenter, pointing to the carpets and paintings, "these all belong to us, and will pay for it, or will pay you." All of them were objected to by plaintiff's counsel, and the objections were sustained by the court and the defendant's counsel excepted.

The plaintiff's claim to a recovery rested on her exclusive ownership of the property seized and sold by the sheriff. She had sworn, on her direct examination, that she was the owner, as her own separate property, of the money with which the carpets and some of the paintings were paid for, and that the other paintings not purchased by her were given to her by her aunt.

It was competent for the defendant to contradict her as to the ownership of the property, either by her own evidence, or the evidence of others. If she had stated, before suit brought, when she had no intent to deny her exclusive ownership of the property, and when she was called on to speak the truth as to the ownership if she spoke at all, that the property was not her separate property but that of her husband, or of her husband and herself jointly, it would have had a tendency to impair the confidence of the jury in her whole evidence, and to establish affirmatively as against her, an ownership of the husband in the property. This was precisely what an affirmative answer to the questions put to her would have proved, or have had a tendency to prove, and I confess I am unable to conjecture upon what ground the evidence was excluded. The court, however, did permit the counsel to inquire of the witness whether she at any time said to Carpenter, or in his presence, that the paintings and carpets belonged to her and her husband, and they would pay the debt.

The question excluded limited the conversation to the time when Carpenter was applied to for the loan. The question

admitted was not limited to any time; it, therefore cures the error committed in the repetition of the former questions, and gave the defendant the benefit of an answer to substantially the same question.

The witness Lowenburg testified on his direct examina- that he would value the picture called "The Sacrifice" at $500. On his cross-examination he was asked how much he would give for that picture. This question was objected to and excluded, and the defendant's counsel excepted. He was also asked whether he thought the picture could be sold for the price he had named. This question was also objected to and excluded.

It must be considered that what the witness would give for a picture, was no evidence of value; but the object of the inquiry was not to obtain an answer which would control the jury in the estimate of value, but to ascertain whether the estimate was not grossly unreasonable. It was a legitimate inquiry on cross-examination. So also as to the other question; the market value might not be a proper estimate of value, but it was a criterion by which the jury might test the accuracy of the opinion as to the value.

I think the question was improperly overruled.

I am of opinion, however, that for the rejection of the evidence above mentioned, the judgment of the court below should be reversed and a new trial ordered, costs to abide the event.

Judgment affirmed.

PETER W. ENDERS *et al.*, *v.* ADAM STERNBERGH *et al.*

A deed appearing to be of the age of thirty years, may be given in evidence without proof of execution, if such an account of it be given as may, under the circumstances, be reasonably expected; and such as affords the presumption that it is genuine.

Secondary evidence may be given of a document which has been accidentally lost and destroyed without the fault of the party offering it, although such document is one, which, from age or other circumstances, proves itself, instead of being authenticated by ordinary proof of its execution.

Where evidence has been offered, and has been rejected by the court, it is to be presumed the proposed evidence would have been given had the court permitted it to have been.

THIS is an appeal by the defendants from a judgment in favor of the plaintiffs, rendered in an action of ejectment, tried before Justice DEODATUS WRIGHT and a jury at the Schoharie circuit, in June, 1857. The recovery was for sixty acres of land in Morris and Coeyman's patent, lying in the town and county of Schoharie. The plaintiffs are children of Catharine and Elizabeth Enders, who were grandchildren of Lambert Sternbergh (1st), who died in 1765, and children of his son, Adam, who died in 1764. The latter left three children, Lambert (2d) and said Elizabeth and Catharine, and left also a will, claimed to cover the premises in question, in which he devised an estate for life to his son, Lambert (2d), with remainder over to his daughters, Elizabeth and Catharine. Under this will the plaintiffs claim title to the premises in question. Lambert (2d) died in 1829, leaving a son, Adam, who has two sons, John and Lambert, and the three latter are the defendants in the suit.

They claim title to the premises under their father and grandfather, Lambert (2d), under an alleged will of Lambert (1st), sometimes called the patentee, devising the premises in question, as is alleged, to his said grandson, Lambert (2d). The latter also claimed title by deed from one Adam (sometimes called "crazy Adam") Sternbergh, of the 17th May, 1785, the latter being the eldest son

of Jacob Sternbergh, who was himself the eldest son of Lambert (1st). The defendants claimed that if their title failed under the will of Lambert the patentee, they could still trace a successful title to themselves under the deed of crazy Adam, who, it was claimed, in default of a will, was entitled to the premises by descent, under the laws of primogeniture. The plaintiffs claimed that there was no sufficient evidence of any seizin in the premises in Lambert (1st) at all, or that his son Adam, the testator, under whom they claimed, ever derived his title from his father, Lambert the patentee. Lambert (1st) had other sons, Abram, the father of Elizabeth Enders, one of the witnesses in the case, and Nicholas and David, executors of his alleged will; the latter, David, also having children, Henry, Philip and Peter, one of whom (Philip) had a daughter, Christina, wife of Caleb Carpenter, the latter being also a witness in the case, and who, at the instigation of his wife or her uncle, burnt up (in 1844 or 1846) the old will of Lambert (1st), under an apprehension that it would, if discovered, endanger their title to a portion of the real estate of Lambert the elder of which they were in possession.

One of the leading questions in the case arose upon the exclusion by the judge, at the trial, of copies of this will; one of which had been made by Carpenter some ten or twelve years before the time he burned it; he having received from his wife, and had in his possession the original some seven or eight years, from about the period of his marriage. Another in the handwriting of General Gebhard (who was dead), purporting to have been copied 27th December, 1829. A third in the handwriting of Hermanus Bouck, who died in 1831 or 1832. A portion of this will, alleged to embrace the premises in question, was also copied into the aforesaid deed of crazy Adam to Lambert Sternbergh (2d), which also referred to, and corresponded with the date of, the will in question. A motion for nonsuit was made in the case, upon the ground that the suit having been commenced the 28th November, 1853, more than twenty years had elapsed since the death of Lambert (2d), which took place in 1829, and,

therefore, the plaintiffs' right was barred by the statute of limitatations.

The plaintiffs offered several depositions in evidence taken on commission, the reading of which was objected to on the ground that it did not appear thereby that the orders for the commissions had been filed in the office of the county clerk, or of the clerk of this court. The objections were overruled, and the defendants excepted. Certified copies of these papers are now produced showing that they were duly filed. Exceptions were taken to the charge of the judge, and to his refusal to charge in several particulars which, so far as they are material, will be hereafter noticed.

Much evidence was given on the part of the plaintiffs of the parol declarations of Lambert (2d), during the time he was in the possession of the premises, tending to show that he had but a life estate in the premises in question, most of which was objected to by the defendants as incompetent, and exceptions were taken to its admission.

Similar declarations of the defendants themselves were also introduced in evidence. It was met by counter testimony on the part of the defendants of Lambert's declarations, tending to show that he claimed an absolute title in fee. The other material facts of the case sufficiently appear in the following opinion. The Supreme Court, at General Term, denied a new trial, and judgment having been entered for the plaintiffs, the defendants appealed therefrom to this court.

A. J. Parker, for the defendants (appellants).

L. Tremain, for the plaintiffs (respondents).

HOGEBOOM, J. The nonsuit was properly refused irrespective of the question whether the limitation applicable to the case was 20 or 25 years. To make the limitation applicable at all on such a motion, there must have been evidence of adverse possession, and that evidence must have been substantially uncontroverted or so greatly preponderant as to overthrow a verdict rendered in opposition to it. To justify

the defense of adverse possession, the possession must appear to have not only been adverse, but continually and uninterruptedly so. (*Colvin* v. *Burnett*, 17 Wend., 55; *Brant* v. *Ogden*, 1 Johns., 156.) There was much evidence to show by the declarations of Lambert, that it was not of that character, but was consistent with the plaintiffs' title. This evidence was proper at least to characterize the possession, if not to control the title.

There was also evidence of the defendants' own admission of a similar character. It was, therefore, a proper matter for the jury to determine, and furnishes an effectual answer to the motion for a nonsuit. (*Pitts* v. *Wilder*, 1 Comst., 525; *Hunter* v. *Trustees of Sandy Hill*, 6 Hill, 507.)

I think, however, one or more copies of the will of Lambert the patentee was erroneously rejected. By that will 300 acres of land (which there was evidence to show covered the premises in question) were given to his grandson Lambert Sternbergh under whom the defendants claim.

This will if it had been produced, would have been admissible without proof, as an ancient paper. It was regular upon its face; that is, apparently executed with legal formality. It bore date on the 7th of January, 1765; the testator died in the same year; it was "an old, ancient paper from its looks; it was rolled up; the paper was coarse; looked as if it had been folded; it was worn; ink and all looked old; coarse handwriting." It was found among the descendants of the testator, in the possession of a family whose ancestor was an executor named in the will; referred to names and places consistent with the other testimony in the case; was handed down in the family, according to the family tradition, from the executor himself, he being also a devisee in the will; and there was evidence to show claim of title and actual possession, corresponding with the provisions of the will.

If this last particular, possession in accordance with the will, is sustained by the evidence, as I think it clearly is, for the possession of the defendants themselves, in addition to that of other parties, may be said to be of that character, then

according to all the authorities it would have been admissible without proof of execution. (*Jackson* v. *Laraway*, 3 Johns. Cases, 283; *Jackson* v. *Chrismen*, 4 Wend., 277.)

But it never was absolutely indispensable that possession, in strict accordance with the terms of the instrument, should be shown to entitle the paper to admission as an ancient paper. If it were so, many a title would be destroyed. Nor is it possible to trace possession back beyond the knowledge of living men, except by tradition or hearsay, or by the intrinsic probabilities of the case, and the consistency of existing facts with such prior possession. Mere efflux of time will not make it admissible without proof. But aside from this, any circumstances which go to confirm the genuineness or authenticity of the document, make it admissible in evidence. It "must be corroborated by possession or *other circumstances*." (*Jackson* v. *Luguere*, 5 Cow., 221; *Jackson* v. *Laraway*, 3 Johns. Cases, 283; *Starkie* v. *Bowen*, 6 Barb., 114, 115.)

A deed appearing to be of the age of thirty years may be given in evidence without proof of execution or possession, if such account of it be given as may, under the circumstanes, be reasonably expected, and will afford the presumption that it is genuine. (3 Johns. Cases, 283; *Kewlett* v. *Cook*, 7 Wend., 371, disapproving dictum of KENT, J. in *Jackson* v. *Blaashan*, 1 Johns., 298; see also *Bogardus* v. *Trinity Church*, 4 Sandf. Ch., 623; Greenl. Ev., § 114, note 3.)

It is said that there was no evidence that the will, or any of the copies, were thirty years old. This is an entire mistake. The paper itself, if an original (and to some extent also if a copy), bearing upon its face the marks of age and authenticity, contains intrinsic evidence of the time of its execution, more or less strong, according to circumstances.

The date of the paper, if resembling the residue of its contents, and not appearing to be altered or interpolated, or otherwise spurious, is of itself a circumstance of some strength to show the period of its execution, inasmuch as a suspicion of its genuineness is not to be unreasonably indulged. But in this case there was positive evidence of its

antiquity. A deed of Adam Sternbergh, introduced in evidence, and not disputed to have been executed in 1785, and recorded as early as 1786, contains an extract from this will and refers to it by its date, showing, of course, its existence at a prior period. One of the copies is proved to have been in the handwriting of Harmanus Bouck, a lawyer, who died in 1831 or 1832, twenty-five or twenty-six years before the trial, and was out of practice some years before his death; another copy, made from the last by General Gebhard, purports to have been made on the 27th of December, 1829. Still another copy, an exact copy, and the most important of all, was made by Caleb Carpenter from the original, between the time it went into his possession, nineteen years before the trial, and seven or eight years afterward, while it was in his possession. This witness (and his wife corroborates him) describes the original will itself, and gives such particulars of its appearance and apparent genuineness as, I think, clearly entitles it to be used in evidence if its contents could be shown. I know of no rule of law which absolutely requires the evidences of genuineness and authenticity to be determined by *inspection* before a court and jury, instead of *competent proof* from persons who had seen it—its non-production being sufficiently accounted for.

If then the paper itself, if produced, would be admissible, is not evidence of its contents admissible in case it be lost or destroyed? I am not aware of any exception to the rule except this, that if the paper be purposely destroyed by a party having an interest in its contents, he shall not be permitted to substitute secondary evidence, because the willful destruction of the more reliable witness tends to throw suspicion upon the verity and authenticity of the inferior evidence. (*Riggs* v. *Taylor*, 9 Wheat., 483; *Blade* v. *Noland*, 12 Wend., 473; 2 Cow. & Hill's Notes, 1206.)

Further than this, I am not aware that the rule has ever been carried. Innocent parties should not suffer from the indiscretion or wickedness of others with whom they have no connection, and of whose acts they have no knowledge. I do not discover anything tending to cast suspicion on the defend-

ants as having been in any way connected with, or cognizant of the destruction of this paper. The established rule, therefore, applies that the next best evidence is to be admitted. (*Fetherly* v. *Waggoner*, 11 Wend., 599.)

The secondary evidence, if in its nature admissible, was of the most satisfactory character. It was in writing, and sworn to be an exact copy. A second copy, differing, however, in the name of one of the subscribing witnesses, was also produced; but whether copied from the original, does not appear. A third copy, which, though copied from the last preceding copy, was in all respects like the first copy, was also produced.

These were all alike, except in the single particular above mentioned, and coincide also in point of date and contents with the extract from the will contained in the deed of crazy Adam, of 1785.

The first being proved to have been taken from the original, was entitled to very high consideration as evidence, and, as it seems to me, was clearly admissible. I think it is no sufficient answer to this to say this is dangerous evidence. Like all secondary evidence, it is not equally satisfactory or safe with that of the original paper; but it would invade a perfectly well-settled rule of law, and in many cases operate most oppressively, to withdraw it entirely from the consideration of the jury.

Nor do I think we are authorized to say that the exclusion of this evidence was not injurious to the defendants. How can we know this? and what is the legitimate inference, when the foundation stone of one of two distinct defenses is thus abruptly removed? To say that the defendants have another equally strong defense if either were available, is to make an assumption which the jury, it is quite possible, were not prepared to sanction. The other defense was founded upon the deed of crazy Adam. It may be that they concluded that a deed from crazy Adam did not confer a title altogether sound, especially as one of the witnesses testified that one of the defendants informed him that crazy Adam was not considered competent to transact business. Further,

the will and the deed support and corroborate each other in regard to the defense founded on the deed. There being evidence to show there *was a will*, it was proper, if not necessary, that that will should be produced, and being produced and claimed to confer only an estate for life, the two together concur to give character and strength to the title set up under them on the part of the defendant. Besides, this case comes up on exceptions, and it is nearly a universal rule that material evidence erroneously admitted, or excluded upon exception, requires a new trial, and that we are not permitted to speculate upon the probable effect of the error upon the final result. (*Dresser* v. *Ainsworth*, 9 Barb., 619; *Worrall* v. *Parmalee*, 1 Comst., 519.)

It does not belong to the judge at the trial to reject one of two good defenses which the party may offer, especially when he does not put his decision on any such ground, nor indicate to the jury his opinion on the other branch of the case. The party has a right to take his chances before the jury on both, and it is dangerous for a court of review to indulge in conjectures as to the probable non-prejudice to a party of the exclusion of an instrument of evidence vital to one branch of his defence. There would be more plausibility in this aspect of the case if we could see that the judge at the trial had distinctly charged that the defendants, if entitled to succeed at all, were entitled to a verdict of the jury under the deed from crazy Adam.

Again, the will appears to have been an important item of evidence to rebut the presumption of a deed relied on by the judge in his charge, from Lambert to Adam. This was material evidence on that point.

I think further, that if the exclusion of the will at the trial was upon the ground (as it manifestly was not) that the defendant had another substantial ground of defense, such ground should have been (as it was not) stated by counsel and sustained by the judge as a legitimate objection to the testimony. The parties then could have distinctly taken their exceptions to such a ruling and distinctly prepared themselves for other grounds of defense.

Again it is said that the rejection of this evidence was of no moment for the further reason that the will, omitting words of inheritance, gave only a life estate to Lambert (2d), waiving the question whether the will conferred a fee or a life estate only on Lambert (2d), (which is not without embarrassment, for the will purports to dispose of all the testator's *temporal estate*, and there is no residuary clause giving the remainder of this estate to any other person). I think it cannot be said this evidence was unimportant, for the following reasons:

1. If it showed a *life estate* in Lambert (2d), it was proper to show that fact as *introductory* to and in *connection* with other evidence on which a complete defense was to rest. Thus it was competent to show it in connection with the deed from crazy Adam; which evidence it corroborated and supported.

2. It tended to show *title out of Adam*, the son of the testator on whom (Adam) the plaintiffs relied as the source of their own title. Adam died before his father, Lambert, and if Lambert was seized and died in possession of the premises, of which there was much, not to say conclusive evidence, proof of Lambert's will, carrying away the estate from Adam, and, of course, from his devisees, would be a very material link in the chain of defendants' evidence, and whether it showed an estate in fee in Lambert (2d), was not so material as that it showed title out of the plaintiffs.

If Lambert (1st) died in possession owning the premises, then the only way in which the plaintiffs could claim would be as his heirs-at-law. But defendant Adam (as well as numerous other persons) was also (in such case), his heir-at-law, and the parties would be tenants in common, and the plaintiffs would not be entitled to recover at all without showing an ouster by their co-tenants, which would not be presumed, and if they did recover would be entitled to only a fractional proportion of the premises, instead of the entire tract which they in fact recovered at the trial. Moreover, I think so narrow, and far from obvious ground for the exclusion of apparently proper evidence, should have been

mentioned at the trial, to the end that the party ruled against might have had an opportunity to obviate the objection by other evidence. Again it is now urged, but without ever having been suggested on the trial, that this will neither devises nor assumes to devise the premises in question.

I should be strongly inclined to adopt the contrary view, that it was assumed at the trial, and therefore must be taken for granted here, that it did dispose of the premises in question. I am aware that there is proof in the case tending to show that one of the defendants admitted that the crazy Adam deed (which related to the same premises as did the will) "was of no use against the Enders' *because it related to the woodland*" (a different tract); but there is, on the other hand, much evidence tending to show that it *did* relate to the premises in controversy, and it was, therefore, a question to be submitted to the jury. The witnesses (several of them) show that the premises in controversy are lot No. 110 in Morris and Coeyman's patent (the woodland lying in the Sternbergh patent), and several others testify that the mother of Lambert, 2d (the devisee), lived on the farm in question, which satisfies the words of the devise, which are: "I give unto my grandson, Lambert Sternbergh, three hundred acres of land, *which his mother now has in possession*, or two lots." There can be no question that there was enough, at all events, in favor of the defendants' location of this tract to draw the question to the jury. In any aspect in which I am able to consider it, I am of opnion that one or more copies of the will were erroneously rejected.

I am not satisfied with that part of the charge which authorized the jury, in case Lambert, the father of the testator, Adam, was originally the owner of the premises in question, to presume a conveyance from Lambert to Adam if they were satisfied from the evidence such conveyance had been made. There would seem to be a saving clause to the otherwise positive direction or authority of the court in the phraseology at the end of this sentence, but when we come to consider, as the case states, that "all the evidence upon which said charge was founded is set forth in the bill

of exceptions," and on examining that evidence find no proof of any such conveyance, nor tending to prove that one had been made, I think the remarks of the judge are exceptionable and well calculated to mislead the jury. The judge had already told the jury, in effect, that the death of Adam in possession implied title in him at his death, because he had said that the will of Adam, if he died in possession, *prima facie*, gave title to the plaintiffs, which I think was as far as he was authorized to go. To encourage the jury to go further and presume, in the absence of evidence and against evidence, a conveyance from the father to the son, when it was a disputed question before them whether the father or the son was in possession, and there was much evidence tending to show that the father was at the time of his death, one year after the son's death, and the father had made a will (or there was evidence tending to show that he had) disposing of the property in question, was but stimulating them to indulge in the loosest presumptions; in the first place to presume title in fee in Adam from the fact of possession at his death, and, if he was not in possession, to presume a conveyance from his father to Adam in order that Adam's will might take effect. The rule on the subject is carefully and, I think, well stated by Chief Justice TINDAL in *Doe* v. *Cooke* (6 Bing., 174 - 179): "No case can be put in which any presumption has been made, except when a title has been shown by the party who calls for the presumption, good in substance, but wanting some essential matter necessary to make it complete in point of form. In such case, when the possession is shown to have been consistent with the fact directed to be presumed, and in such cases only, has it ever been allowed."

There are subordinate questions in the case which I do not deem it necessary to examine, and if I am right in the conclusions thus far arrived at, they are wholly unimportant to be considered.

I think the judgment of the Supreme Court was erroneous, and should be reversed; and that a new trial should be granted, with costs to abide the event.

DENIO, Ch. J. I am of opinion that upon the evidence which was given respecting the will, of which a copy was offerred in evidence, and upon the proof which was proposed to be given and was rejected, the copy should have been received. I do not perceive why, upon principal, secondary evidence may not be given of a document which has been accidentally lost or destroyed, without the fault of the party offering it, although such document was one which, from age or other circumstances, proved itself, instead of being authenticated by ordinary proof of its execution. The law regards an ancient deed or will which has been kept in the proper custody, and where the possession and enjoyment of the property devised or conveyed, has corresponded with the dispositions of the instrument as *prima facie* an authentic document. So far as its consistency as a piece of evidence is concerned, it stands on the same footing as an instrument duly proved or acknowleged. If a paper, the execution of which can be proved, is lost or destroyed, a party interested under it may, from the necessity of the case, prove what it contained and avail himself of it as though it had been produced. But if, instead of being capable of proof, by bringing witnesses to its execution, it be shown to be a paper which, under the circumstances appearing in evidence, proved itself, and did not require the production of witnesses to its execution, the reason for admitting secondary evidence of its contents would appear to be equally strong as in the other case. So far as the evidence of antiquity arising from the appearance of the paper is material, the party would have to supply it by oral testimony from one who had seen it. No doubt it would be more satisfactory to have the paper to produce before the court and jury, but where this cannot be done, the same principal of necessity which admits secondary evidence of its contents would allow proof of its general appearance, and of the marks of antiquity which were apparent upon it. To show the reasonableness of this position, suppose an ancient deed or will to have existed down to a very late period antecedent to the trial, and to be accompanied with all the circumstances required to admit its reception

without proof of its execution, and then that it was accidentally burned up. No one, I think, would claim that the party interested under it, would forfeit his rights by being precluded from giving secondary evidence of its contents. The evidence to bring this will within the rule was in my opinion sufficient. It purported to have been duly executed and attested; it was found in the hands of a descendant of the testator, who was also a descendant of one of the executors; it was therefore found in proper custody. The paper was about eighty years old when it was destroyed, and it had all the appearance of age which a paper which had existed so long would be expected to have. The premises in controversy had been held in consistency with its dispositions. Lambert Sternbergh, the grandson of the testator, to whom it was devised, entered into possession of it as soon as he came of age, previous to which his mother, who was his natural guardian, and her husband, had been in possession. This is precisely what would have happened if the will were a genuine paper. The alleged will also devised land to all the testator's children, and among them to his son Abraham, and a daughter of this Abraham was examined by the defendants who offered to prove by her that her father acquired real estate under the will of his father, the testator, in the alleged will; but this was rejected. In testing the question we must consider that the offered evidence would have been given had it been allowed. In addition to this, a very explicit act recognizing the will as an authentic one was shown by the production of the deed from Adam Sternbergh, to Lambert the grandson of the testator. This deed was executed seventy-two years before the trial and only about twenty years after the date of the alleged will, when the disposition which the testator had made of his property must have been known and remembered among his numerous family. Both parties to it were the descendants of the testator, and the grantee a devisee under the alleged will, the grantor being his grandson and his heir-at-law, and the grantee also a grandson and the devisee of the premises in controversy. The deed refers to the will accurately by

its date, and it moreover recites one of the disposing clauses in *haec verba*. This proof taken together appears to me to have been quite sufficient to warrant the reception of the will in evidence as an ancient will within all the cases. The evidence of its destruction and of the accuracy of the copy offered in evidence was entirely satisfactory. It follows that the ruling by which it was excluded when offered was erroneous.

It is a much more difficult question whether, considering the course which the trial subsequently took, the error was at all material. The deed from Adam Sternbergh, the grandson of the testator and his heir-at-law, to another grandson, Lambert Sternbergh, under which the defendants claim title, to which I have just referred for another purpose, was sufficient to carry to the grantee the title to the premises, on the assumption that Lambert (the elder) died intestate as to his property, either wholly or in respect to the reversion expectant on the death of Lambert, the grandson. Hence, it is urged, with some reason, that if Lambert Sternbergh (the elder) died seized of the premises, the defendants made out a title to them under the deed of his heir-at-law, and thus the existence of the will became of no direct importance. If there had been any question of fact to submit to the jury respecting the deed, it could have been answered that the defendant should have been permitted to show both branches of his title; but upon the facts proved there was no such question. There was no answer to the defendants' title under the deed, provided the elder Lambert Sternbergh died seized, and if he did not, the will could have no operation.

The plaintiffs claim under the will of Adam Sternbergh, one of the sons of Lambert (the elder), executed in 1763. He, Adam, died the next year, and his father survived him, and died in 1765; having made his will, according to my view of the evidence, in January of that year. The will of Adam, in its general terms, embraced the premises, provided the testator was entitled to devise them, and under that will the ancestresses of the plaintiffs took a vested remainder sub-

ject to the life estate devised to Lambert, his son. The real question in the case, therefore, was, whether Adam was seized of the premises at the date of the will and at his death. If he was, the plaintiffs' title was complete, but otherwise they they had no pretense of title. No paper title in him was attempted to be shown. But possession of a person with a claim of ownership is *prima facie* evidence of title, and possession alone, without anything to qualify it, would be presumptive evidence of title. After such a length of time no living witness can speak as to the fact of possession of his own knowledge, and I think there is no rule admitting hearsay upon such a question.

The premises in question appear to be embraced in two deeds, executed respectively by Philip Schuyler and others, and by Cornelia Schuyler and others to Lambert Sternbergh the elder, in 1754; eleven years before the death of the grantee. The title is not traced further back, nor is there any direct evidence that the grantee entered under the conveyances: If the copy of this will had been admitted, an authentic assertion of ownership on his part would have been shown, within about ten years from the execution of the deeds to him. The lands in question, among others, were specifically devised by that will to his grandson Lambert. It is unimportant to consider whether the want of technical words of inheritance would have limited the devise to an estate for life, because if the elder Lambert was the owner at the time of his death, the plaintiffs would have taken nothing upon his intestacy of the reversion. There is no competent evidence that Adam, the son of Lambert (1st), ever had possession of the premises. It is, however, probable; for his will, after his death, and at the time of the death of the wife of his father, was in possession, as appears by the will itself. But this same evidence, which shows her to have been in possession at that early period, also shows, argumentatively, that the possession was in subordination to the title of her husband's father; but in the same instrument he disposes of it to her son, the second Lambert; which he would have no right to do if her husband had died seized.

There was much evidence of the declarations of Lambert (2d), as to his title to the premises. He undoubtedly often admitted in substance that he held under the will of his father, which gave him only an estate for life, with remainder to his sisters, under which the plaintiffs claim; but he also sometimes claimed that his father did not own the land, and that *he* held it under the will of his grandfather. The declarations of Adam, the defendant, and his desire, and that of his sons, the other defendants, to conceal the will of the elder Adam, were entitled to little weight, as neither he or they could have known anything respecting the source of title of Lambert (2d). The will of the elder Adam is not in any respect hostile to that of his father, the first Lambert. It does not devise the premises in question specifically, although it embraces them if he owned them. If he did not own these premises, it took effect only upon his other lands; and it is clear that he was seized of other real estate, probably in large quantities, as he was or had been joint patentee with his father of three thousand acres in the Sternbergh patent. The will of the first Lambert is an assertion of dominion over the particular premises in question, and the will of his son Adam is not hostile to that assertion, as the devise is general, and, in effect, rebinding, and does not assert a right to dispose of these or of any particular lands. These remarks are not made with a view of examining the verdict of the jury, but in order to test the materiality of the evidence excluded, and to try the correctness of the charge.

As an historical problem, I should consider the probability to be that Adam was in possession of the premises without title, but with the permission of his father, and that the latter, after his son had died before him, elected to devise the premises to the only son of his deceased son. I am inclined to the opinion that the excluded will was competent upon the question of ownership or seizin between this father and son, considering the obscurity of the other evi dence and the great length of time which had elapsed. It was a strong assertion of ownership, and should have been

considered in connection with the other proof. I think that part of the charge of the judge was erroneous in which he instructed the jury that if Lambert, the father of the testator Adam, was originally the owner of the premises in question, the jury might presume a conveyance from Lambert to Adam, if they were satisfied from the evidence that such conveyance had been made. There was no evidence that Adam possessed the premises for any considerable length of time before his death, if he was in possession at all. After his death and the death of his father, which soon followed, possession of his widow and of her second husband was as consistent with the suggestion that the land had always belonged to Lambert, the father, as that he had conveyed it to his son. There was then really but a short possession, if any, upon which to base the presumption. To presume a deed under such circumstances would be mere conjecture, not warranted by any principle of law.

I am in favor of reversing the judgment and granting a new trial, for the error in excluding the copy of the will and for the error which I have pointed out in the charge.

Reversed.

EVERETT CLAPP v. GRACE C. MESEROLE.

The doctrine of extinguishment by judgment, has no application where the judgment is not against the principal debtor, but against one collaterally liable. In such case, there must be both judgment and satisfaction to affect the principal debt

An administrator *de bonis non* can maintain an action against the representatives of a deceased executor, who died without applying the assets which had come to his hands.

Where legacies have been bequeathed to several legatees, and the executor has committed a devastavit, the estate is to be considered the principal debtor, and is not to be discharged from such legacies except by payment, and any judgment against the executor for such legacy, is to be deemed as collateral and auxiliary merely; not as affecting the principal debt.

APPEAL from a judgment of the Supreme Court affirming a decree of the surrogate of Kings county, made upon the final accounting of the appellant, Clapp, as the administrator with the will annexed of Simon Richardson, deceased. The decree, besides adjusting the accounts of the appellant as administrator, orders distribution of the sum of $8,809.26 found to be in his hands unadministered among certain of the legatees under the will of the deceased, and the question presented relates chiefly to the principles upon which the distribution was made. The testator died in the year 1850, leaving a widow, two sons and three daughters, several grandchildren, the children of a deceased daughter, and another grandchild, the daughter of a deceased son. To the last-mentioned grandchild he gave a legacy of $2,000, which has been paid, and respecting that there is not now any question. To his widow he gave one-third of his personal estate and the income for life of one-third of his real estate. She died before the present controversy arose, and there is no question arising upon the provision made for her. He gave one-sixth part of the residue of his personal estate to each of his five surviving children, and the remaining sixth part to his executors in trust for the children of his deceased daughter, that share to be equally divided between those children. He devised his real estate to his executors in trust to receive the

rents and profits until they should sell the same, and gave them a power to sell. The rents and profits while the real estate remained unsold, except the one-third given to the widow, and the proceeds of the sales, when made, were to be divided among his children and grandchildren in the same proportion as the residue of his personal estate as above mentioned. He recited that he had made advances to three of his children, namely, to his two surviving sons, William and Stephen, $10,000 each; to his deceased daughter, Mrs. Lewis, in her lifetime, $1,300; and to one of his surviving daughters, Grace, $1,100. He directed that these advancements should be added to the sums composing the amount to be divided, and that the aggregate should be distributed in the proportions above mentioned, but a deduction was to be made from the shares of those to whom advancements had been made of the sums advanced to them respectively. The testator's wife, his sons, William and Stephen, and his brother, Marvin, were appointed executrix and executors. The sons alone appear to have acted, and no question arises as to the other persons appointed. Letters testamentary were issued to his sons in the year 1850 and they took possession of the estate and undertook to execute the trusts of the will.

In May, 1856, they sold and disposed of the interest they had in the estate as legatees and devisees under the will to certain persons, under whom the appellant acquired title to their interest by a subsequent purchase. Being thus possessed of their rights as legatees and devisees, he cited them to account as executors before the surrogate. One of them, Stephen F. Richardson, petitioned for a final settlement as executors and trustees pursuant to the statute, and the proper citation having been issued, and the parties having been heard, the accounts of the two executors were settled and allowed, and the decree for distribution was made. The sum to be distributed was found to be $55,327.26. It embraced the advances mentioned in the will as having been made by the testator to four of the legatees, and it, moreover, embraced a sum of $8,281.23, for an indebtedness of the

two executors to the estate, for a deficiency arising upon the sale of certain premises which they had mortgaged to the testator in his lifetime to secure a debt which they owed him. Taking this aggregate as the amount to be divided, each one of the six shares mentioned in the will amounted to $9,221.21. The surrogate proceeded to adjust the claims of each of the legatees and devises, several of whom had received from the executors payments on account of their shares.

Stephen F. Richardson and William S. Richardson, being each chargeable with $10,000 as advances, were not awarded anything as beneficiaries under the will. They were ordered to pay each of the three daughters the following sums, being the ballances of the shares of said daughters after deducting the advances made to such of them as had been advanced and the payments made to them by the executors, viz.: to Grace C. Meserole, $3,520.81; to Jane A. Richardson, $2,361.21; and to Clementine Richardson, $7,627.36, and to the children of Mrs. Lewis, the deceased's daughter, several sums amounting to $7,021.21, being the balance of the sixth share, which sum, deducting amounts which the executors had paid to some of them, was properly distributed among these grandchildren. This decree was made on the 1st day of June, 1861.

Pending the proceedings on the accounting which resulted in that decree, and on the 14th of October, 1859, the said Stephen F. and William S. Richardson were, by an order of the surrogate of Kings county, removed from their office as executors, and on the 30th of December following, the appellant was appointed administrator with the will annexed of the goods of the deceased unadministered. The accounting proceeded and the decree for distribution was made notwithstanding this change. The appellant entered upon the administration.

On the 31st July, 1861, he applied to the surrogate of Kings county for a final settlement of his accounts, and a citation was accordingly issued and served upon all the parties interested. The decree made upon that application was

the one from which the appeal in this case was taken. It appeared on the hearing from the administrator's return, and otherwise that the only assets which had come into the hands of the appellant, as administrator, was the sum of fifteen thousand seven hundred dollars realized upon the sale of certain mortgaged premises, under a mortgage which belonged to the estate; and, that after deducting certain expenses, and commissions, there came to the hands of the appellant to be administered the sum of $14,031.72. This was further reduced, by the retaining of a considerable sum for a disputed claim, and other sums for admitted debts, and about seven hundred dollars for counsel fees to $8,809.26, which belonged to the beneficiaries under the will and their assigns, or to some of them.

It was not claimed that the former executors, Stephen F. and William S. Richardson had paid the several amounts directed to be paid by them by the former decree.

The surrogate determined upon the present application, that the appellant, as the owner of the shares, which had belonged to S. F. and W. S. Richardson, was not entitled to any portion of the sum to be now distributed. He showed, by a statement contained in the decree, that the shares of each of the persons were liable to a deduction of $10,000 on advances under the provisions of the will, for one-half of the deficiency on the sale of the mortgaged premises above mentioned, and for one-half of the sum adjudged by the former decrees to be paid by them and which they had not paid. The aggregate deductions against each of them thus amounted to $18,971.25, which exceeded their proportion of the whole fund. He decreed the distribution of the above sum of $8,809.26, in the hands of the appellant, among the other beneficiaries under the will in a manner not drawn in question on this appeal, and directed the appellant to pay them accordingly.

Except that a clause was ordered to be inserted to the effect that the sum of the first degree ordered to be paid by S. F. and W. S. Richardson should be considered undistributed assets of the estate of the deceased, and that the par-

ties interested in that estate, or any of them, should be at liberty, at any time, to apply to the surrogate of Kings county for future directions in respect thereto.

The decree was affirmed at a General Term of the Supreme Court, and the appellant, the administrator with the will annexed, prosecutes the present appeal.

J. C. Smith, for the appellant.

J. L. Campbell, for the respondent.

DENIO, Ch. J. It is not claimed that there was any error in the decree of the surrogate, so far as the settlement of the appellant's accounts as administrator are concerned. He does not complain that he was charged with any greater sum than that which had come to his hands, or that any allowances to which he was entitled were rejected. But, as the assignee of the testamentary gifts in favor of S. F. and S. W. Richardson, he was interested in the distribution of the balance in his hands as administrator, and the supposed error of which he complained affects only his interest as such assignee. In that character he represents the Richardsons, and can claim no other rights than they would have been entitled to if they had not parted with their interests, but were now the claimants of a share of the assets distributed by the decree appealed from. As legatees, they were chargeable, in the first instance, with $10,000 each for advancements made to them by the testator in his lifetime, and it is not contended by the appellant that they, or he, as their assignee and representative, would be entitled to anything until the legatees of the other four shares had each been paid an equal amount, that is, ten thousand dollars on each share. But upon stating an account with each of the other shares, and charging the legatees with the advances made to two of them, and charging them respectively with all which had been paid them by the executors, it would require much more than the amount in the appellant's hands for distribution to make the payments to each of them equal to the $10,000 which each of the appellant's assignees had received, or, rather, were

chargeable with in the outset. The appellant's position, therefore, is, that the sums adjudged to be paid to these other legatees by the former decree should be considered as having been actually paid, and as extinguishing their legacies to that amount. By adopting that view, they would still each have received considerably less than the $10,000 which each of the Messrs. Richardson were chargeable with; but if enough of the balance in the appellant's hands were applied to make the five other legacies $10,000 each, there remains a surplus divisible among the legatees of the whole six shares, in which the appellant would be entitled to participate as the assignee of the two shares.

When it is considered that the legatees of the four shares given to persons other than the Messrs. Richardson have not been paid any part of the sums adjudged to them by the former decree, and that the failure to pay them arose from a breach of trust on the part of the Messrs. Richardson, and, moreover, that the appellant, as their assignee, stands precisely in their place, and has no other rights than such as they would have had if they had retained their interests and had been parties to the distribution of the sum now in controversy, his claim seems to be remarkably defective on grounds of natural equity. If it can be sustained at all, it must be on account of some positive rules of law which the court is not at liberty to disregard, and it is accordingly attempted to be supported on such grounds.

It is argued, in the first place, in substance, that the decree is in the nature of a judgment, which ordinarily merges and extinguishes the cause of action for which it was recovered. The right to the four legacies having thus been extinguished *pro tanto*, they cannot, it is said, be made use of, as to the portion so extinguished, to found a future claim upon other assets subsequently realized. There is, no doubt, a technical rule of the nature suggested, but I do not think it is applicable to this case. When the decree was made against the Messrs. Richardson, they had ceased to be executors, having been removed by an order of the surrogate. It was correct, I think, to continue the proceedings against them, notwith-

standing their removal. They were parties, who by means of their former position as executors, had got into their hands the assets of the deceased, and one of them had, before his removal, applied, on his own behalf, for an accounting respecting the trust. But if this were otherwise, and if the proceedings ought to have ceased when the executors were removed, it would not add to the effect of the decree. If it were void for that reason, it would not, of course, affect the rights of the legatees, in whose favor amounts were adjudged. But considering it, as I do, an effectual adjudication, and binding upon the parties charged, it was not a judgment against the estate, or against persons representing the estate. That was then represented by the appellant, and the Richardsons were third persons, who were accountable to the estate for moneys which they had received belonging to it, and which it was their duty to pay over to the parties to which it belonged. The remedy against them was, therefore, collateral to the claim of the legatees against the estate. The estate, or its then representative, was their principal debtor. Anything which they could obtain by means of this collateral remedy would be applicable to their demands upon the estate. But should they fail to obtain anything, their claim against the estate would not be impaired. The doctrine of extinguishment by judgment has no application where the judgment is not against the principal debtor, but against one collaterally liable. In such cases, both a judgment and satisfaction are required to affect the principal debt.

It is suggested that the first decree may possibly be enforced hereafter so as to produce satisfaction, and that in such an event the holders of the four shares will get a larger part of the estate than they are entitled to. The same feature would always be presented where a collateral security is carried to judgment.

Should the debt be afterward paid by the principal debtor it would not be right for the creditor to take the fruits of the judgment upon the collateral security, and the law would not permit him to do so. After payment by the party principally liable, he would be entitled to be subrogated to the

rights of the creditor upon the collateral judgment, and such creditor would be declared a trustee for his former debtor.

It is argued that the appellant, the present representative of the estate, is not entitled to enforce the former decree for want of privity with the subject, and authorities are cited in support of that position. We have lately had the question before us whether an administrator *de bonis non*, was entitled to maintain an action against the representative of an executor who had died without applying the assets which had come to his hands including moneys which he had collected, and we came to the conclusion that under the statutes the administrator could maintain such an action. (*Walker* v. *Walker*, decided at the June Term 1864.) That decision answers the suggestion referred to.

It is further argued that the surrogate in making the decree appealed from, charged against the shares given to the Richardsons and were held by the appellant, the amount awarded against them by the former decree, as effects of the deceased wasted. The point of the objection is that they disposed of their property in their legacies to them anterior to the *devastavit* is a matter with which the appellant is concerned. It is a sufficient answer that these legatees after death of the testator became possessed as executors of all his personalty, and under the trusts of the will were entitled to receive the rents and profits and proceeds of the sales of the whole real estate. Being both executors and legatees, the realization of their legacies depended upon the faithful performance of the trust, and it was not possible for the legatees to separate the interest from the duty. He could not convey away the former and then waste the assets with which it should have been paid. The duty which attached to the legacy in the hands of the legatees, followed it into the hands of the appellant.

The same remarks are applicable to the sum charged against the legacy to the Richardsons, on account of their indebtedness to the estate for the deficiency arising upon the sale of the mortgaged premises under the foreclosure of a mortgage.

That was a part of the debt owing by them to the testator at the time of his death. The proceeds of the sale on the foreclosure had not been realized at the time of the last accounting. After the change, by which the appellant was substituted for the executors as the representative of the estate, the appellant realized a certain amount, and the balance of the mortgage debt became absolutely chargeable against the Richardsons, the mortgagors. But the whole debt was coeval with the legacy, and the full payment of the debt was an equitable condition to the receipt by them of their legacies. This condition accompanied the legacies into the hands of the appellant.

In the view I have taken of the case I have impliedly conceded certain positions which may well be controverted. By laboring to show that the first decree was in its nature collateral to the demand of the legatees against the estate, because it was against parties who were not executors, I have assumed that if this were otherwise the appellant's point, that the legacies were extinguished *pro tanto*, would be well taken. If the accounting had taken place while the Richardsons had remained executors, and they had been unable to pay the amounts awarded against them because they had misappropriated the assets with which it ought to have been paid, and other assets had subsequently come into their hands, it is not possible that they could have treated the unsatisfied judgments against them in favor of the other legatees, as payments to those legatees, and on that basis have claimed a distributive share of subsequent assets, leaving the other legacies unpaid. The correct view, even in such a case, would be to regard the estate as the principal debtor, which could not be discharged except by actual payment, and to look upon the judgment against the executors as auxiliary only, not affecting the principal debt, that is, the legacies to the daughters and grandchildren, unless they became satisfied by producing payment, and in no sense an extinguishment; and if the executors could not set up such a position to increase their own dividend as legatees out of

the after acquired assets, no person claiming title under them could do it.

The saving which the Supreme Court added to the decree was a suitable provision, though not, I think, strictly necessary to preserve the rights of the legatees in any manner to be afterward realized as under the first decree. I am satisfied that the judgment of the Supreme Court ought to be affirmed.

Judgment affirmed.

JAMES ACKER v. JAMES A. ACKER.

A statement is sufficient to authorize a judgment by confession, under section 383 of the Code of Procedure, which states the indebtedness to be twofold, first, on a promissory note, giving amount and date, "being for money loaned me by plaintiff to commence business as a merchant;" and, second, on a promissory note, stating amount and date, "being for money paid by plaintiff for me on the real estate I now own at Irving."

APPEAL from an order of the General Term of the Supreme Court, affirming one made at Special Term, setting aside the judgment entered by confession in this case, upon the motion of James Besson, a subsequent judgment creditor of the defendant. The statement upon which the judgment was entered was in these words:

"JAMES ACKER
vs.
JAMES A. ACKER.

"I hereby confess judgment in this action in favor of James Acker, plaintiff, for the sum of three thousand five hundred and thirty-six dollars, and authorize judgment to be entered therefor against me. This confession of judgment is for debts justly owing by me to the said plaintiff, and now due to him, arising upon the following facts; that is to say: one promissory note for twelve hundred and eighty dollars, dated May 1st, 1850, with interest from May 1st, 1852, being for money loaned me by said plaintiff to commence business as a merchant; one promissory note for two thousand dollars, dated May 16th, 1850, with interest, being for money paid by said plaintiff for me on the real estate I now own at Irving in the town of Greenburgh, with two hundred and thirty-six dollars interest due thereon at the date of this judgment, amounting in the whole to the sum of three thousand five hundred dollars and thirty-six cents.

"JAMES A. ACKER.

"WESTCHESTER COUNTY *ss:*

"James A. Acker, the above named defendant, being duly sworn saith the facts stated in the above confession are true. "JAMES A. ACKER.

"Sworn and subscribed before me this 16th of June, 1855, } "ISRAEL PURDY, *Justice of the Peace.*"

John H. Reynolds, for the appellant.

John K. Porter, for the respondent.

DENIO, Ch. J. The statement upon which this judgment is confessed is challenged on two grounds: first, that the amount professed to have been loaned in one of the items, and the amount professed to have been advanced for the defendant's use in the other, is not stated; the argument being that the loan or advance of a very small sum, such as one dollar, in each case, would satisfy the language of the paper; and, second, that there is a failure to state the circumstances connected with the indebtedness with the particularity required by the statute. By the law and the former practice of the courts, a judgment might be confessed for any amount which the parties pleased to insert in the bond and warrant of attorney; and there was no need of any reference in the papers to the particulars out of which the indebtedness arose. Under this state of the law, a subsequent creditor who might respect the good faith of the incumbrance thus interposed, would have no means furnished by the record, of investigating the subject. The legislature interposed, in 1818, a provision requiring the *plaintiff* to place on file a *particular statement and specification* of the nature and consideration of the debt; and, if this was omitted, the judgment was to be deemed fraudulent against subsequent *bona fide* creditors. (Laws of 1818, ch. 259, § 8.) This act existed but three years, and was repealed in 1821, with a saving of the rights of parties affected by judgments confessed while it was in force. (Session Laws, ch. 38.) The few existing members of the profession who were attorneys

or law students at that day, will remember that the effect of the requirement was to avoid many judgments honestly confessed on account of a want of particularity in the statement. Where fraud was designed the statement would usually be made in all due form, while those who did not suppose that their motives would be suspected were apt to omit descriptive particulars which the statute and the courts have declared indispensable. When the general revision of the statutes was enacted in 1830, it was not thought wise to return to that policy. It may be that the experienced lawyers who were concerned in compiling that system, had a recollection of the evils which led to the repeal of the act of 1818. However this may be, it has happened that after the lapse of forty years, it has been thought judicious to recur in a modified manner to the policy which dictated that act. It is apparent, as has often been mentioned, that the sections of the Code which provide for confessions of judgments without action, have in view the same ends with the act of 1818, and it may be said in a general way, to be a return to the policy of that act. But it adopts somewhat different means to accomplish the end. It requires the oath of the alleged debtor as to the existence and amount of the indebtedness, which the former act did not. The statement is to be made by the defendant, and not by the plaintiff. Instead of a *particular statement and specification*, of the nature and consideration of the debt, as prescribed by the former act, it is to be a *concise statement of the facts out of which the debt arose*, and showing that the sum confessed is justly due. If the author of this section penned it with the act of 1818 before him, or in his mind, as has been supposed, there was certainly an intention to relax the strictness of the requirement, and to abridge the extent of detail. The observations of the Supreme Court in *Lawless* v. *Hackett* (16 Johns., 149), to the effect that the statement ought to be as particular as a bill of particulars, cannot with any propriety be applied to the present provision. Take for instance, an account for merchandise sold. Under the prior statute, all the items must have been copied, and for the purpose of showing that the

balance was justly due, the entries of credits must have been set forth.

In most cases such an account would be anything but concise. This could not possibly have been intended, and we have so held in at least two cases. (*Neusbaum* v. *Keim*, 24 N. Y., 329; *Gandall* v. *Finn*, Sept. Term, 1863.) In my opinion they are the *general* facts out of which the indebtedness arose, and not a particular specification of these facts, which the law requires. There must be enough to identify the transaction, if there was really one, so that the parties interested may make further inquiries respecting it, and it must contain allegations enough, if true, to show that the amount for which the judgment was confessed was justly due. We have decided that the mere statement that the plaintiff held the note of the defendant was not sufficient, as it clearly is not; for one might be given on the day on which the judgment was confessed. (*Chappel* v. *Chappel*, 2 Kern., 219.) But we have not said that the existence of a note or other obligation in the hands of the creditor is of no account in determining the sufficiency of the statement. If given for a consideration, satisfactory to the parties, and in the ordinary course of business, at a considerable period before the confession of judgment, it would be an important fact in showing how the debt arose. It would not be sufficient to state, in general terms, that it was given for a just consideration; but I think a general statement that it was for money borrowed, or for the balance due on an account, mentioning the nature of the dealings out of which the account arose, or some similar statement, is all that is needed. If we test this judgment by these rules I think it is above all exception. There is, in the first place, a positive statement that the confession is for debts justly owing and due from the defendant to the plaintiff. If any part of the amount was not really due and owing, the statement is, to that extent, untrue, and the oath is false. It is then averred that this indebtedness arose out of facts next to be stated. The facts are that the plaintiff is the holder of two promissory notes made by the defendant, one dated May 1st, 1850, for $1,280, on which interest was due from May

1st, 1852. The other dated May 16th, 1850, for $2,000 also on interest; that the first mentioned note was given for money loaned by the plaintiff to the defendant. The occasion of making the loan is, moreover, stated. It was to enable the defendant to commence business as a merchant. The other note was given for money which the plaintiff had paid for the defendant. The occasion of that advance is shown by the averment that it was *on* real estate which the defendant then owned at Irving, in the town of Greenburgh. This, according to the common understanding of every one, means that it was on account of the purchase of that real estate. It is then stated that the interest on these notes was $236, and that the aggregate was $3,536, which is the amount of the judgment. These statements satisfactorily identify the transaction out of which the indebtedness arose. They brought, to all persons interested in the subject, the means of a rigid investigation of the business and *bona fide* character of the alleged debts. It would not be precise and certain enough for a special verdict, or circumstantial enough for an answer to a bill for a discovery, calling for all the particulars of the indebtedness for which the judgment was confessed, and it was not the intention of the statute that it should be. The criticism to which the learned counsel for the appellant has subjected the paper, is too severe for the occasion; for it overlooks its legal character and the purposes for which it was required to be given. It was not necessary for its statements to exclude all possible circumstances which might affect the integrity of the debt, or to give all the circumstances relating to it. When the defendant swears that the note of twelve hundred and eighty dollars was given for money loaned him by the plaintiff, it means, to a common intent, that such an amount was loaned, and so in respect to the other note, given for money paid. And when it is said that the confession is for debts justly due and owing by the defendant to the plaintiff, and goes on to specify the paper which he held and the consideration of that paper, it is hypercritical to say that the indebtedness was not alleged to be to the full amount of the principal and interest of that paper.

Upon the whole, I am of opinion that this is one of the most satisfactory statements which have been brought before us in this class of appeals, and I am for reversing the order of the Supreme Court.

INGRAHAM, J. Under the first decisions made in this court where a question similar to that involved in this case was decided, there may have been some doubt as to the sufficiency of the statement on which this judgment was entered. I refer to *Chappel* v. *Chappel* (2 Kern., 215) and those immediately following. But since the cases of *Frelich* v. *Brink* (22 N. Y., 418) and *Neusbaum* v. *Keim* (24 N. Y., 325) a more liberal rule has prevailed within those cases. I think this statement is sufficient. The cause of action is twofold. First, on a promissory note, giving amount and date, "being for money loaned me by plaintiff to commence business as a merchant," and, second, on a promissory note, "being for money paid by plaintiff for me on the real estate I now own at Irving." The objection to these statements is that they do not state the amount loaned or paid, the terms of the loan, and the time when made, and in the latter case, the name of the person to whom paid, and whether one or more sums.

I think such particularity is not called for by the statute. The statement declares the note to be given for money loaned. The presumption is that it was one sum loaned and that it is due. The terms of the loan are not required to give it validity. Nor are the names of the persons to whom the payment was made necessary to be stated. Nor is it necessary for the debtor to negative the loan being made to more than one person. The presumption is that it was made to one only. Unless something to the contrary appears, that is sufficient.

The orders setting aside the judgment should be reversed.

SELDEN, J., absent. All the other judges being for reversal,

Order reversed.

WILLIAM CLEMENTS, Appellant, v. DANIEL GEROW.

JACOB RYDER, Appellant, v. DANIEL GEROW.

CORNELIUS CARPENTER, and others, Appellants, v. DANIEL GEROW.

THE MIDDLETOWN BANK, Respondent, v. DANIEL GEROW, and others.

A statement upon which to enter a judgment by confession, under section 383 of the Code, in these words: "This confession of judgment is for a debt justly due to the plaintiff, arising upon the following facts: For money lent by said plaintiff to me on the first day of April, 1856, and interest thereon from the first day of April, 1857," is sufficient.

A statement in these words: "This confession of judgment is for a debt justly owing from me and due to the plaintiff, arising from the following facts: For money borrowed by me of him in June, 1855, for which I gave him my note and one year's interest thereon," is sufficient.

A statement in these words: "This confession of judgment is for a debt justly due and owing from me to the plaintiffs for goods, wares and merchandise, groceries, dry goods, salt, calico, muslin, molasses, sugar and other articles sold and delivered by them to me, at various times within the last two years, as per schedule annexed," is sufficient, although no schedule is in fact annexed to the confession.

If a statement is sufficiently concise, within the language and meaning of the Code, the omission of a schedule therein referred to as "annexed," will not invalidate the judgment.

THESE are appeals by William Clements, Jacob Ryder, and Cornelius Carpenter and others, as the plaintiffs in these several judgments rendered in the Supreme Court, upon confession against Daniel Gerow, from three several orders of the Supreme Court, setting aside said judgments on the application of the Middletown Bank, for a supposed defect in the statement of confession. On the 16th of October, 1857, the Middletown Bank obtained a judgment in the Supreme Court against Daniel Gerow and others, and on the 19th of October, 1857, a transcript thereof was filed, and the judgment became a lien on the lands of Gerow, in the county of Sullivan. Prior to this time, and on the 17th of September, 1857, Gerow had confessed a judgment to

Clements for $1,242.60, another to Jacob Ryder for $327.10, and another to Cornelius Carpenter and others for $196.10, the judgment rolls in each case being filed in the clerk's office of Sullivan county, and judgment entered.

In the case of Clements, the statement on confession is as follows: "I do hereby confess judgment in this cause in favor of William Clements, the plaintiff, for the sum of one thousand two hundred and twenty-eight dollars and fifty cents, and authorize judgment to be entered therefor against me. This confession of judgment is for a debt justly due to the plaintiff, arising upon the following facts: For money lent by said plaintiff to me on the first day of April, 1856, and interest thereon from the first day of April, 1857."

In the case of Ryder, it was as follows: "I do hereby confess judgment in this cause, in favor of Jacob Ryder, of Westchester county, the plaintiff, for the sum of three hundred and twenty-one dollars, and authorize judgment to be entered therefor against me. This confession of judgment is for a debt justly owing from me, and due to the plaintiff, arising from the following facts: For money borrowed by me of him in June, 1855, for which I gave him my note and one year's interest thereon."

In the case of Carpenter and others, the statement was as follows: "I do hereby confess judgment in this cause in favor of the plaintiffs, for one hundred and ninety dollars, and authorize judgment to be entered therefor against me. This confession of judgment is for a debt justly due and owing from me to the plaintiff, for goods, wares and merchandise groceries, dry goods, salt, calico, muslin, molasses, sugar and other articles sold and delivered by them to me, at various times within the two last years, as per schedule annexed.

No schedule was in fact annexed to the confession. The Middletown Bank, on motion, applied to the Supreme Court at Special Term to set aside the judgments on the ground that the statements were not in compliance with the provisions of the Code, and that court granted the motion and vacated the judgments. The orders were affirmed at the General Term, and the plaintiffs in these three actions appeal to this court.

DAVIES, J. We have had occasion frequently to examine the statements authorizing the confession of judgments under the 383d section of the Code. The principles enunciated in the various cases which have been under consideration in this court will, in their application, dispose of most, if not all of the questions which can arise under this section. Two or three late cases decided here, are conclusive upon the question raised on the present appeals. The statements in the judgments in favor of Clements and Ryder, are in substance identical. The difference is of no moment. In the former case the money is stated to have been lent by the plaintiff to the defendant on a day certain. In the latter, the money is stated to have been borrowed by the defendant of the plaintiff, in June 1855. In either case the facts are stated with sufficient consciseness. In *Lanning* v. *Carpenter* (20 N. Y., 447) the statement declared that the note mentioned therein was given for money borrowed, and although the date of the note was given, the date or time when the money was borrowed was not given as in the present case. In that case this court held the judgment to have been entered upon a sufficient statement. In *Freligh* v. *Brink* (22 N. Y., 418), the statement declared the indebtedness to have arisen on a promissory note, made by the defendants to the plaintiff, giving its date, in the sum of $700 and interest, that amount of money being had by the defendant of the plaintiff, and stating the amount then due thereon. This court held that statement sufficient. It was there said that the note is set out with all necessary particularity as to parties, date and amount; and it is added, "that amount of money being had by the defendant of the plaintiff." It would be hypercritical to hold this, not to be a statement that the note was given for so much money that the defendant had received of the plaintiff. This shows it to have been money borrowed by the parties who gave the note and confessed the judgment to the payee of the note, who is plaintiff in this judgment; for the advancing of money by one party to another to be repaid at a future time, is a good definition of the contract of lending.

The doctrine of these two cases fully sustains the correctness of the statement in the cases of Clements and Ryder. It is urged that the statements do not state anything as to the amount due; this we think an error; we think a natural and obvious construction of the language used in Clements' case is, that the amount due to him from the defendant on the day of the confession, was the sum of $1,228.50, and that that sum was made up of a certain sum of money loaned by the plaintiff to him on the first day of April, 1856, together with the interest thereon from April 1, 1857, to September 17th, 1857, the date of the confession, and that the aggregate of principal and interest due on that day was $1,228,50; an arithmetical calculation from this data, will speedily and accurately determine the precise amount of principal and of interest separately entering into the amount of the indebtedness. The same remarks will apply to the statement in the case of Ryder. Both statements must be held sufficient within the principles settled by this court.

The confession in the case of Carpenter and others, enumerates with particularity the articles sold and delivered by the plaintiff to the defendant, and the total amount thereof, to wit, $190.00. It is true that it omits to state the date of the sale of each particular article and the price thereof, but it sets forth the nature and kind of goods purchased by the defendant of the plaintiff, and the time within which they were bought, namely, within two years preceding September 17, 1857. Reference was made to a schedule which it was intended to have annexed to the statement, but which would seem, for some reason not stated, to have been omitted. If the statement is sufficiently concise within the language and meaning of the Code, its omission would not invalidate the judgment. In *Newsbaum* v. *Kewin* (24 N. Y., 325), we held a statement sufficient which was in this form: "this confession of judgment is for a debt justly due to the plaintiff, arising upon the following facts: the said plaintiff, at various times in the years 1854 and 1855, sold and delivered to me large quantities of meat, and upon such sale there is now justly due to the plaintiff as aforesaid a balance of the said sum

of $2,114,60, with interest thereon from the 18th day of January 1855." We said in reference to that statement, that it imputed to a common intent, a dealing in butcher's meat between the parties, in which Kewin was the purchaser from Newsbaum, and a delivery of the different parcels at divers times, so as to constitute an account between them. This indicates the facts out of which the indebtedness arose, as plainly as it could be done, without copying the items of the account. That such a prolix statement as a bill of parcels was not contemplated is evident from the admonition in the section (383) that the facts must be stated concisely. This case also disposes of the objection now urged, that the omission of the schedule referred to in the statement, made the judgment invalid. *Lockwood* v. *Finn*, was heard in this court at the October Term 1863, and decided in December of that year. In that case the confession, after setting forth the amount for which judgment was authorized, stated that "the above indebtedness arose on an account for goods, wares, and merchandise, and property sold and delivered to me by said plaintiffs, and for which I have not paid." The Superior Court set aside the judgment, but on appeal to this court the order was reversed and the statement held sufficient. It will be seen that the facts out of which the indebtedness arose in the Carpenter judgment, are more fully stated than in the judgment against Finn. In the latter statement, there was an omission of any time at which, or within which the sale and delivery of the goods specified was made. The statement in the Carpenter judgment must be regarded as more fully setting forth the facts out of which the indebtedness arose, than was done in the two cases above referred to in this court. We must regard them with all that fullness and particularity contemplated by the Code, and that the three judgments above referred to against Gerow were valid and legal, and should not have been vacated. The orders appealed from, vacating the same must be reversed with costs.

JOHNSON, J. The confession in each of these cases is for money due, and the statement in each shows the amount

for which the judgment is to be entered, and that the sum confessed is justly due to the plaintiff. It also states concisely the facts out of which the indebtedness arose. The principal objection is that in neither statement is it set out, in express and specific terms, that the indebtedness was for the precise sum for which judgment is confessed. But it is unnecessary that this should be set out in exact and precise terms if the fact is made to appear by the statement. (*Lanning* v. *Carpenter*, 20 N. Y., 447–458.) The fact certainly does appear from each of these statements. In each case the confession is for a certain amount stated, and for which judgment is authorized to be entered. The statement then proceeds: "This confession of judgment is for a debt justly due" from the defendant to the plaintiff. Here, then, is a definite and certain amount confessed, and the further unqualified statement that the confession is for a debt justly due. It says plainly, I confess judgment for this amount which is justly due. This is the plain meaning of the statement, taken together, and no other meaning can be given to it without straining to defeat it. There is no good reason for attempting to interpret these statements in a captious and unfriendly spirit. All that is necessary is to see that the requirements of the Code are fairly and substantially complied with. There is certainly no obscurity about either of these statements, and, to my mind, no evidence of any attempt to omit or evade any requirement of the statute. They show with quite as much precision and certainty that the sums for which judgments are severally confessed are justly due, as does the statement in *Lanning* v. *Carpenter*, *supra*, or that in *Gamble* v. *Finn*, decided in this court at the last December Term.

The order of the Special Term of the Supreme Court, setting aside these judgments, and the order of the General Term, affirming the same, should therefore both be reversed.

HOGEBOOM, J., was for affirmance. All the other judges being for reversal.

Judgment reversed.

THE BRITISH COMMERCIAL LIFE INSURANCE COMPANY, Plaintiffs in a writ of *certiorari*, Appellants, etc., *v.* THE COMMISSIONERS OF TAXES AND ASSESSMENTS FOR THE CITY AND COUNTY OF NEW YORK, Respondents.

The language of the act of February 27, 1855, subjecting to taxation "all (non-resident) persons and associations doing business in the State of New York," is comprehensive enough, either under the term "persons" or "associations," to embrace foreign insurance companies.

A foreign life insurance company doing business in this State is properly taxable in the city where the principal place of business, or office, of the agency is situated.

Where a foreign insurance company, in pursuance of the provisions of the act of 1853, deposited with the comptroller of the State $100,000, for the benefit of such of its policy holders as should be citizens of this State, of which $50,000 was in public stocks of the United States, and $50,000 in bonds of the city of Buffalo; *Held*, that the $50,000 of government stocks was exempt from State taxation; but that the bonds of the city of Buffalo deposited with the comptroller were subjected to taxation.

APPEAL from a judgment of the General Term of the Supreme Court, affirming the judgment of a Special Term, on *certiorari*. The plaintiffs are a corporation, incorporated by act of Parliament of the United Kingdom of Great Britain and Ireland, passed in 1821, and are authorized by their charter to make insurance on lives. They have never been incorporated in this State. They have sixty-eight agencies in the United States, and twenty-eight agencies in different counties in this state, for the purpose of receiving applications for insurance. The agents receive applications for insurance, and upon approval of the risks by the directors in England, the policies are made out and transmitted to the agents here, who transmit to the company the premiums received by them. The losses are paid through the agents. By an act passed the 24th day of June, 1853 (chap. 463), it was provided, in the 15th section thereof, that it should not be lawful for any person to act as agent in transacting the business of any life or health insurance company, partnership or association, incorporated by or under the laws of any foreign government, until such companies should have deposited with the comp-

troller, or superintendent of the insurance department, for the benefit of such policy holders thereof as should be citizens or residents of the United States, securities to consist of public stocks to the amount of $100,000. The plaintiffs deposited with the comptroller of this State, pursuant to the provisions of this act, the sum of $100,000, consisting of $50,000 of the bonds of the city of Buffalo, and $50,000 of the public stocks of the United States of America, for the benefit of policy holders, citizens or residents of the United States. On the 27th of February, 1855, an act was passed providing for the assessment and taxation of all persons and associations not resident of this State, doing business in this State. This act provided, in substance, that all persons and associations doing business in the State of New York, and not residents of this State, should be assessed and taxed on all sums in any manner invested in said business, in the same manner as if they were residents of this State. (Laws of 1855, chap. 37.) The deputy tax commissioners for the year 1857–8, under the direction of the commissioners of taxes and assessments, within the time required by law, assessed the personal property of the plaintiffs at $100,000. (Laws of 1857, pp. 498, 499, vol. 2, § 10.) That assessment was made in respect to the $100,000, of stocks and bonds deposited with the comptroller as above set forth, and is claimed to be authorized by the act of 1855. The principal office or agency of the plaintiffs is in the first ward of the city of New York. The plaintiffs sued out a writ of *certiorari* to review the action of the commissioners. Judgment was rendered thereupon, at special term, reversing the proceedings of the commissioners as to the $50,000 of United States stock, and affirming the assessment in respect to the $50,000 of Buffalo city bonds. From this judgment both parties appealed to the General Term, which affirmed the judgment given at Special Term, and both parties now appeal to this court.

Chas. A. Rapallo, for the insurance company.

A. R. Lawrence, Jr., for the commissioners of taxes.

HOGEBOOM, J. I think the language of the act of 1855, in subjecting to taxation "all (non-resident) persons and associations doing business in the State of New York," is comprehensive enough, either under the term "persons" or "associations," to embrace foreign corporations like the applicants in this case, under the statutory and judicial definitions annexed to those terms; and that there is no sound principle of equity or public policy which should exempt them, more than others, from the burdens of government. Whatever may have been the leading or proximate motive for the passage of this act, the generality and comprehensiveness of its terms, in my opinion, forbid the exclusion of companies like the present from its operation. I think, also, in analogy to the general statutory rule as to the place for taxing corporations (1 R. S., 390, 1st ed.; 909, 5th ed.), it was properly taxable in the city of New York, where the principal place of business or office of the agency is situated.

The only real embarrassment arises upon the other ground of exemption claimed by the applicant, to wit, that the moneys deposited with the comptroller or insurance superintendent for the benefit of such of the policy holders as should be citizens of the State, are not sums invested in any manner in the business of said corporation.

The argument of the applicant is that this deposit is not a sum invested in its business, but withdrawn therefrom — separated from the other assets of the company, constituting a special trust fund in the hands of the comptroller, not subject to the control of the company nor liable to the claims of its general creditors; but declared by law to be merely a security to its policy holders, residents in or citizens of the United States; and if invested in the business of the company, is not invested in its business done in this State, inasmuch as it is a security for all its policy holders in the United States.

The argument of the tax commissioners is that the relators are doing business in this State, inasmuch as they have twenty-eight agencies for the purpose of receiving applica-

tions for insurance, transmitting applications to the principal, delivering policies, collecting premiums, and paying losses; that domestic insurance corporations of a like character thus doing business are, by the Laws of 1853 (pp. 888, 889, 1029, 1030), required to have a *capital* not less than $100,000, which is to be invested in *stocks*, deposited with the comptroller as *security* for *policy holders*, and are by the general laws of the State taxed therefor as *capital* (1 R. S., 944, 5th ed.); that it is apparent from the phraseology of the 15th and other sections of the same act (Laws of 1853, p. 893), that the legislature intended to impress the same character upon the deposits of foreign life insurance companies, inasmuch as they prohibited any agent of a foreign company to act in any manner in this State in procuring applications for insurance, or in any manner to aid in transacting its business until $100,000 were deposited with the comptroller for the benefit of citizen or resident policy holders, in securities "of the kind required by section sixth for similar companies of this State;" that the deposit is, therefore, made for a kindred, and indeed, identical purpose with that required of domestic incorporations; and must be regarded as *capital* for the same purposes and with like effect as in the case of domestic companies, and embraced within the definition of the capital of a corporation declared by this court in the case of *The Mutual Insurance Company* v. *Supervisors of Erie* (4 Comst., 448) to wit, the fund upon which it transacts its business, which would be liable to its creditors, and in case of insolvency pass to a receiver; and that whether this fund is to be regarded as capital or not, it comes within the comprehensive language of the act of "sums invested *in any manner* in its business;" that it is invested in its business, because it is the fund or foundation upon which it does its business, a prerequisite to the transaction of its other business, a fund to which the creditors or policy holders resort for payment, which cannot be withdrawn from its business, which measures, in a more convenient way than any other which the legislature could prescribe, the extent of its business; and which furnishes the only medium through which

foreign organizations of this nature can be reached for the purposes of taxation, or placed upon a similar level of liability with domestic corporations.

These considerations are preponderating, in my mind, to lead me to the conclusion that the relators are brought within the scope and operation of this act of 1855, for the purposes of taxation. I cannot express them in greater force, and I do not deem it necessary to expand the arguments enforcing their applicability to the case under review.

There in nothing in the decision of this court in the case of *The People* v. *The New England Insurance Company* (26 N. Y., 303), which conflicts with the conclusion just announced. The act of 1853 before mentioned repealed the act of 1851 (chap. 95), which required a deposit of stocks, from insurance companies of *other States* doing business in this State, but compelled such deposit from insurance companies of *foreign countries*. The stocks of the New England company remaining with the comptroller were therefore regarded in the light of a *voluntary deposit* in no way connected with its business nor accessible to the claims of its creditors. There is nothing, therefore, in the point in judgment in that case which interferes with the application of the equitable principle proposed to be enforced in the present case.

The decisions of the Special and General Terms of the Supreme Court were therefore in all respects correct, inasmuch as the exemption of United States stocks from taxation is made imperative upon us by the judgment of the Supreme Court of the United States, and as both parties have appealed therefrom, the judgment of the court below should be affirmed without costs to either party, as against the other.

INGRAHAM, J. The decision of the court below as to the United States stock must be considered as correct under the recent decisions of the Supreme Court of the United States on the same question. The stock of the United States is exempt from State taxation, and here the assessment is

directly made upon such securities. The respondents' counsel concedes this, and does not argue this branch of the case.

It is objected, on the part of the appellants, that the place of assessment should be where the comptroller resides, upon the ground that he holds the funds as trustee, and he, not the company, should be assessed.

The property is the property of the company held by them, not deposited with the comptroller as security. It would not be taxable if the company did not carry on business in this State.

By the provisions of the R. S., vol. 1, 5th ed., p. 908, § 1, all lands and all personal estate within this State, whether owned by individuals or by corporations, are made liable to taxation, and by section 4, debts due on bonds are included under the term personal estate.

By 1 R. S., 5th ed., p. 908, § 5, every person is to be assessed in the town or ward where he resides for the personal estate owned by him, and by section 6, the personal estate of every incorporated company liable to taxation on its capital shall be assessed in the town or ward where the principal office or place of transacting the financial business is located, or where the operations of the company shall be carried on. The return states that the place of business of the corporation is in the city of New York, which is admitted by the demurrer.

The act of 1855, section 1, provides that all persons and associations doing business in this State, and not residents of the State, shall be assessed and taxed on all sums invested in any manner in said business, the same as if they were residents of the State. Taking these provisions together, I think there can be no difficulty in holding that the place of assessment is the place where the operations of the corporation are carried on. Generally, under "persons," as used in laws providing for taxation, corporations have been included, unless some special provision of law provided in the same case for the taxation of corporations under another form of assessment. (*The People* v. *Utica Ins. Co.*, 15 Johns., 258.) And so corporations have been considered as inhabitants, for

the purpose of taxation. (*Ontario Bank* v. *Burwell*, 10 Wend., 180.)

These cases show that corporations are to be included under the general term persons in regard to their liability to taxation in the place where they carry on their business; and that there is no ground for the objection that the corporation was assessed in the city of New York.

The other question is, whether the plaintiffs are liable to be taxed upon the bonds of the city of Buffalo deposited with the comptroller. There can be no doubt but that those bonds are included under the term personal estate, as used in the statute; and the only question which can arise is whether they are property invested in any manner in the business which they carry on. Upon this point there can be but little doubt. The statute prohibits foreign corporations from carrying on business of life insurance until such company have deposited with the comptroller securities to the amount of $100,000 for the benefit of the policy holders of the company. (Laws of 1853, ch. 463, § 15.)

This deposit with the comptroller is necessarily made in connection with the business of the company. Without it they can do no business; and it is so deposited as to be security to those who may hold policies of the company. It is therefore used in the business of the company and in fact forms its capital in this State, which is liable to its creditors and comes within the definition of capital as defined in *The Mutual Insurance Co.* v. *Supervisors of Erie* (4 Comst., 448).

These securities so deposited with the comptroller form the same kind of capital as that of a domestic corporation incorporated for a similar purpose, in which the capital is the security for those who deal with it. Neither is actually invested in business and used for that purpose, but both form the basis on which the business is transacted and the security from which payment of claims is to be enforced.

So far as the assessment was made on the bonds of the city of Buffalo the same was properly made, and the order appealed from should be affirmed.

All the judges concurring,

Judgment affirmed.

GEORGE CHAMBERS, Executor of Andries Schoonmaker, v. CHARLES H. CLEARWATER *et al.*

Where an action is brought by two persons, who are partners, to collect a partnership debt, and both are active in obtaining the judgment, although one of them, alone, gives the directions to the officer for seizing the property of the defendant, upon the execution, he should be presumed, in the absence of evidence to the contrary, to have been acting in conjunction with his co-plaintiff in a common enterprise of collecting their joint debt by a seizure of the debtor's property.

The direction to levy an execution upon a particular piece of property is an incident to the obtaining payment of the debt by legal process; and when one of two partners is found acting in that business, the presumption is, that he had the countenance and assent of the other partner.

A judgment, attempted to be rendered by a judge, who is disqualified by reason of consanguinity with one of the parties, is void in the most extreme sense known to the law, and therefore is utterly incapable of being made good by any omission, waiver, or express consent.

APPEAL from a judgment of the Supreme Court. The action was in the nature of trover for two horses, a wagon, harness, etc. One Andrew Roosa was the former owner of the property, and he mortgaged it to Schoonmaker, the original plaintiff, in December, 1851, to secure a debt of $175, payable September 1st, 1852. By the terms of the instrument, the mortgagee had a right to take possession of the property, and sell the same, if at any time he should deem himself insecure.

The defendants, on the 23d June, 1852, recovered a judgment against Roosa for $82.22, before James H. Elmendorf, a justice of the peace of Marbletown. The suit was commenced by the personal service of a summons, was tried by the justice without a jury after an adjournment, the parties appearing and consenting to such adjournment. The property was seized and sold by virtue of an execution issued on this judgment, at the instance of one of the defendants in this suit, they being plaintiffs in the action before the justice. They were partners as retail merchants, and the indebtedness of Roosa, for which the judgment was recovered, was for goods purchased by him from their store. The clerk of the firm was a witness on the trial of the suit against Roosa.

It was proved on the trial of the present case that Silas Wood, one of the defendants, and a plaintiff in the action against Roosa, was a first cousin of Elmendorf, the justice. Elmendorf, who was a witness, also swore that he had been told that Clearwater, the other defendant, and the other plaintiff in the justice's court, was his second cousin, their fathers being, as he had been told, first cousins.

The mortgaged property remained in the possession of Roosa, the mortgagor, till it was seized on the execution.

The defendant's counsel moved for the discharge of Wood, who was not shown to have personally directed the seizure, the direction for that purpose having been given by the defendant Clearwater; but the motion was overruled. The defendants then moved for a nonsuit, which was in like manner overruled.

The defendants then gave some evidence, tending in some slight degree to impeach the *bona fides* of part of the mortgage debt, and offered evidence of the tender of the residue of that debt by the present defendants, but the evidence was excluded.

The judge then directed a verdict for the plaintiff, which was accordingly given. The defendants' counsel excepted to the several rulings against them.

After an affirmance of the judgment at a General Term, (see 41 Barb., 200), the defendants brought this appeal.

J. Hardenburgh, for the plaintiff.

T. R. Westbrook, for the defendants.

DENIO, Ch. J. I am of opinion that the evidence was sufficient to make out a *prima facie* case against both the defendants, so far as related to the question of the seizure of the property. The defendants were both active in obtaining the judgment against Roosa, and although Clearwater alone gave the directions for seizing the horses and wagon, he should be presumed, in the absence of evidence to the contrary, to have been acting in conjunction with the other defendant in a common enterprise of collecting their joint debt by a seizure of

the property in question. Although the commission of a trespass was not within the scope of the partnership enterprise, the collection of the joint debt was a part of that business. The direction to levy the execution upon a particular subject was an incident to the obtaining payment of the debt by legal process, and when one of the partners was found acting in that undertaking, the presumption is that he had the countenance and assent of the other partner.

The plaintiff's mortgage being the earlier title, would have enabled the plaintiff to recover, unless it was shown to be fraudulent. There was no evidence of fraud except the releasing of possession by the mortgagor, but the evidence offered and excluded would have had a tendency in that direction, and should have been received if the defendants were in a position to justify, as judgment creditors of Roosa. This brings up the question principally argued, whether the justice's judgment was void on account of the relationship between the justice and plaintiffs in the action in which it was recovered. If it was erroneous merely, and not wholly void, it would clothe the defendants with the character of judgment creditors of Roosa, and enable them to contest the *bona fides* of the plaintiff's mortgage; but if it was void, the defendants would be only creditors at large, and the mortgage lien valid between the parties, the defendants would be trespassers in seizing the property.

The statute declares that "no judge of any court can sit as such in any case in which he is a party, or in which he is interested, or in which he would be excluded from being a juror by reason of consanguinity or affinity to either of the parties." (2 R. S., 275, § 2.)

It is not denied but that a juror who was first cousin to one of the parties, would be excluded by reason of consanguinity, nor but that Justice Elmendorf erred in sitting as a judge in the action between the defendants and Roosa.

Arguments have been drawn from the strong language employed by the legislature, which in terms positively forbids a judge, in the position which Elmendorf occupied, from *sitting as such;* from which it is reasonably argued that

where he attempts to do so he is not to be regarded as possessing a judicial character, but being only a private individual, and that the proceedings are to be considered *coram non judice*. On the other side are the adduced cases of judicial acts contrary to positive law, which are yet held to be valid when produced for a collateral purpose, and impeachable only by a direct proceeding, in which they are subjected to a review.

It may be conceded that, if there were no more direct authority, the present question might involve some doubt. I am of opinion that it has been settled by authority which we are bound to follow.

In *Oakley* v. *Aspinwall* (3 Comst., 547), one of the then judges of this court was bound to have taken part in the decision of that case though he was distantly related to one of the defendants. The case was decided by the concurring vote of five judges, of whom he was one. The party to whom he was thus related was shown to have no real interest, being fully indemnified by the actual parties in interest to the litigation. He sat in the case at the request of the other party, who afterward questioned the judgment on the ground that he had done so. On a motion to vacate the judgment and the *remittitur* on that ground, the court held that the judgment was not simply erroneous, but utterly void. It was not denied but that the consent would have cured the error, if there had been jurisdiction; in other words, if it were only error; but it was considered that it was void in the most absolute sense which can be expressed by that term. In the leading opinion, prepared by Judge HURLBUT, it was said: "The exclusion wrought by it [the statute] is as complete as in the nature of the case is possible. The judge is removed from the cause and from the bench; or if he will occupy the latter it must be only as an idle spectator and not as a judge. He cannot sit as such. The spirit and the language of the law are against it."

It is argued that the occasion upon which this decision was made was not one in which the judgment was sought to be availed of collaterally, as in the present case, but that it

partook rather of the nature of a review; and that is true. But the situation of the question was the same. If any judgment in which the disqualified judge took part could possibly be valid for any purpose that judgment could have been sustained. The consent which induced and procured the judge to sit would have made the judgment perfectly valid if, under any possible circumstances, it could be made valid. Mr. BROOM, in commenting on the maxim, "*Cenlexus tollit erronem*," says, "The maxim is essential to distinguish a proceeding which is merely irregular from one which is completely defective and void. In the latter case the proceeding is a nullity and cannot be waived by any laches or subsequent proceeding of the opposite party." The reason, upon which judgments palpably illegal and erroneous will yet furnish a justification to parties executing process under them and will be held valid in all collateral proceedings, is that the party affected by them has waived his rights. The waiver, in most cases of this kind, is tacit, and consists in an omission to appeal or bring a writ of error. The defendant is, therefore, held to have consented that the judgment may stand. But if, when he expressly consents, by his counsel, in the most formal and authentic manner, and yet it is not held valid, the matter must be one in which no consent will avail. It must, in short, be void; and this court must be held to have determined, in the case referred to, that a judgment attempted to be rendered by a judge, who is disqualified by reason of consanguinity with one of the parties, is void in the most extreme sense known to the law, and, therefore, entirely incapable of being made ogod by any omission, waiver, or express consent. I think this is so, upon principle as well as authority. If one, who has no just pretense of possessing the character of a judge, should summon a party before him at the instance of another, and assume to render a judgment between the parties, no one would insist that it would be valid for any purpose. It would, of course, be utterly void, and would furnish no justification to any one. If it be true, as I think it is, and as the judge who sat on the motion in *Oakley* v. *Aspinwall* decided that one prohib-

ited by the statute from sitting as a judge, is to be regarded as not being a judge at all, nor entitled to occupy the bench under any circumstances, except as a spectator; it is the same thing as though he had never been raised to the judicial office. His being entitled to sit as a judge in cases to which the disqualification did not apply would not aid him in any degree in cases to which the disqualification attached.

Chief Judge BRONSON dissented from the order made in *Oakley* v. *Aspinwall*; and it generally detracts somewhat from the confidence we feel in a judgment, that it failed to secure the approval of that eminent and accurate judicial officer. But his dissent was placed in some degree, if not entirely, upon the distinction between a court of superior and one of inferior jurisdiction. I do not understand him to have questioned the correctness of the cases of *Edwards* v. *Russell* (21 Wend., 63), or *Root* v. *Morgan* (1 Hill, 654). In the first of these cases it was declared by the court, and in the other it was expressly adjudged, that a judgment rendered under the circumstances of the one under consideration was void. In the last case the judgment was offered as a set-off in a subsequent suit between the parties. The chief judge, I am confident, proceeded on the distinction referred to, and he would not, I think, have hesitated to pronounce the judgment before Justice Elmendorf void.

It has been suggested that the decision of the motion, in *Oakley* v. *Aspinwall*, was not itself made by a competent number of judges. But this is a mistake. Only seven judges took part in deciding the motion, Judge TAYLOR not having heard the argument. The law did not then, as it now does, require five judges to concur in the decision. The legislature had declared six to be a quorum and a majority of a quorum was then competent to give a judgment.

I am in favor of affiming the judgment appealed from.

All the judges concurring,

Judgment affirmed.

WILLIAM D. WHITE, Appellant, v. EBENEZER A. LESTER and others, Respondents.

The provisions of the act of April 4, 1837, authorizing a loan of certain moneys belonging to the United States, as to the entry in the minute-book of the commissioners of loans of the *order* for the advertisement of sale; of a copy of the advertisement; and of the places where, and the persons by whom, the advertisements were put up, are directory, rather than compulsory, as against a *bona fide* purchaser ignorant of any irregularity in the sale.

A purchase of land at a sale made by commissioners for loaning the United States deposit fund, by the cashier of a bank which by its charter has no capacity to purchase lands, is not a violation of the charter of the bank, although the cashier in fact makes the purchase for the benefit of the bank; but without any direction from the directors, and the title is designed to be kept in him.

There is no disability in the cashier of a bank to purchase, in such a case, as there is in the case of trustees, in respect to the lands of their beneficiaries. Hence, the purchase by him will not be void, but will inure to the benefit of the cashier if it cannot be for the benefit of the bank.

Where both commissioners of loans are present at, and make a sale of mortgaged premises, the fact that the entry of the sale in the book of minutes, though purporting to be the act of both, was made by only *one* of them, and was signed only by him, does not amount to a fatal irregularity.

There is nothing in the law which requires this entry to be *signed* by the commissioners; and when it purports to be the *act of both*, the court will not presume against the truth of such statement simply because it is certified to by the signature of one commissioner.

Where a mortgagor, or one succeeding to his title, makes default in the payment of interest, this destroys and forecloses his title — destroys even his common law equity of redemption — and leaves him nothing but a special right of redemption, to be enforced only by a strict compliance with the provisions of the act of 1837.

He has, therefore, no right which can be prosecuted by action of ejectment against the commissioners of loans, or their assignees.

One who takes possession of the mortgaged premises, after default of the mortgagor, under the authority and with the consent of the commissioners of loans, having paid the amount of the mortgage, must be regarded, equitably, at all events, as a mortgagee in possession. And if in under such a title he cannot be dislodged by an action of ejectment; such an action being forbidden by the Revised Statutes.

ACTION of ejectment to recover the possession of certain lands in the village of Fredonia, in the county of Chautauqua. The trial was had in that county before Justice DAVIS

without a jury, and resulted in a judgment for the defendants, which judgment was affirmed at a General Term of the Supreme Court. From the latter judgment the plaintiff appealed to this court. The facts are sufficiently stated in the opinion of the court.

William D. White, appellant, in person.

Chauncey Tucker, for the respondents.

HOGEBOOM, J. The plaintiff sues in ejectment to recover from the defendants the possession of certain premises in Chautauqua county. He claims title through John Z. Saxton who was the admitted owner in 1837, and he showed a regular deduction of title from and through him, sufficient to maintain the action unless it is defeated by facts to be hereafter noticed. The defendants also claimed through Saxton, who, in August 1837, executed to the commissioners for loaning certain moneys of the United States, a mortgage upon said premises pursuant to the laws of 1837 (chap. 150), on which default was made in paying the interest due in October, 1842. On the 6th of December 1842, an entry was made of this circumstance, and of the fact that the premises were advertised for sale for the first Tuesday of February then next, in the commissioners' book of minutes and in their annual report to the comptroller. The premises appear to have been duly advertised for sale by publication and posting in the manner required by law, except that there was no *order* for the advertisement entered in the minute book; nor copy of the advertisement entered therein; nor entry of the places where, or of the persons by whom the advertisements were put up, all of which was enjoined by the statute before referred to. The substance of the statute appears to have been observed in regard to the actual advertisement, and I am inclined to think the provisions as to the entries in the minute book above referred to were, notwithstanding the declaration of the statute (section 33), that "all purchases made contrary to the provisions of this (33d) section shall be void," directory rather than compulsory, as against a *bona fide* pur-

chaser ignorant of the irregularity. These irregularities were not violations of the provisions of the 33d section. (*King* v. *Stow*, 6 Johns. Ch., 323.) On the 7th of February, 1843, up to which time the plaintiff appears to have been in possession, the premises were duly sold by both commissioners, and struck off to one Newland, who then, or within a few days thereafter, received a deed in due form from the commissioners, went into possession and executed to the commissioners a new mortgage upon the premises. The defendants deduce a regular title through him. He paid his bid in cash to the commissioners, and the bid and subsequent transfer of title to the defendants was in his name, though he purchased in fact, as the case states, for the benefit of the Chautauqua County Bank, but without any direction from the directors, by which I understand is meant that that institution was, by the purchaser, intended to have the benefit (if any) of the purchase. I scarcely think this was a violation of the charter of the bank (Laws of 1831, ch. 219), as the purchase was purposely made in the name of Newland and the title designed to be kept in him, although if the premises were subsequently sold at a profit, he meant that the bank of which he was the cashier should have the benefit of it. There was no disability in Newland to purchase, as there is in the case of trustees with regard to the lands of their beneficiaries, and therefore the purchase would not, I think, be void, but would inure to the benefit of Newland, if it could not be for the benefit of the bank. Such a transaction would not avoid the sale as against the plaintiff.

Although both commissioners were present at and made the sale, the entry of it in the book of minutes was made by only *one* of the commissioners and signed only by him, though purporting to be the act of both. This is claimed to be a fatal irregularity, under the case of *Olmsted* v. *Elder* (1 Seld., 144). But no such point was presented in the latter case; and since the case of *Pell* v. *Ulmar* (18 N. Y., 139) it must be regarded as overruled. Moreover, there is nothing in the law which requires this entry to be *signed* by the commissioners; and purporting, as it does, to be the *act of*

both, we cannot presume against the truth of such a statement simply because it is certified to be true by the signature of one commissioner.

There would appear, therefore, to be great doubt whether, if the case for the plaintiff rested upon the irregularity of the proceedings to foreclose the loan office mortgage, they were sufficiently defective to make them invalid. But I think an effectual answer to the plaintiff's claim consists in a fact now to be noticed. The plaintiff, who succeeded to the title of the mortgagor, suffered the mortgage to become foreclosed by operation of law by his delinquency in paying the amount due by the terms of the mortgage. This was held in *Pell* v. *Ulmar* (18 N. Y., 145) to be equivalent to a foreclosure pronounced by the decree of a court, and nothing remained in the plaintiff but a special privilege of redemption. The plaintiff went out of possession, and the defendants (or Newland) took immediate possession under a deed dated as of the day of the sale, and executed a few days afterward. It does not appear, it is true, as suggested by the plaintiff, that the commissioners took *actual* possession. They had no right to do so until after the day of sale, and then they did so in effect by putting their grantee in possession, who, or his successors, has occupied ever since. If we assume that the alleged irregularities in the sale were sufficient to vitiate it as such, nevertheless the default in the payment of the interest, as was held in the case of *Pell* v. *Ulmar*, from which this case cannot be distinguished, destroyed and foreclosed the plaintiff's title—destroyed even his common law equity of redemption, and left him nothing but a special right of redemption, to be enforced only by strict compliance with the provisions of the act of 1837. He had therefore no right which could be prosecuted by action of ejectment against the commissioners or their assignees. Newland took possession under the authority and consent of the commissioners, and having paid the amount of the mortgage must be regarded, equitably at all events, as a mortgagee in possession. If in under such a title he could not be dislodged by an action of ejectment, for such an action is forbidden by

the Revised Statutes. (2 R. S., 312, § 37.) But the case of *Pell* v. *Ulmar* holds that his rights are even less perfect than would be those of a mortgagor against a mortgagee in possession. The plaintiff's counsel has attempted, but I think unsuccessfully, to distinguish this case from *Pell* v. *Ulmar*. He is mistaken in supposing that Newland never took possession under his deed from Green & Douglas; and, I think also, in supposing that the deed was their *individual* deed. It *purported* to be on its face the deed of the commissioners, and such was the effect of the *acknowledgment*.

The judgment should be affirmed.

SELDEN, J. took no part in the decision. All the other judges concurring,

Judgment affirmed.

THOMAS JESSOP *et al.*, Appellants, *v.* STEPHEN C. MILLER *et al.*, Respondents.

One who is a mere surety, to enable another to prosecute or defend an action, is not a person for whose benefit the action is prosecuted or defended, and is not rendered incompetent as a witness, under section 299 of the Code of Procedure.

Hence, a surety in the undertaking given by the plaintiffs in an action for the claim and delivery of property, for the return of the property, is a competent witness for the plaintiffs.

Where property is sold upon a condition, if the condition is not complied with no title will pass from the vendor, and the purchaser will acquire none; nor can he convey any title to his assignees.

The plaintiffs sold to W. a quantity of steel, at the price of $1,072.95, upon the condition that it should be paid for by W.'s note, indorsed by J. C. & Co. The property was sent forward to W. pursuant to his directions, subject to the aforesaid condition. He received the property, but never performed the condition. *Held* that the act of W. was tortious, and that he was liable to the plaintiffs in trespass, for the unlawful taking of the property, and that an action would lie against him without any previous demand.

But that as to the persons claiming the property as assignees of W. under an assignment in trust for creditors, they having acquired possession of the property innocently, without notice of any defect of title in W., an action could not be maintained against them until after demand and refusal.

Held, also, that the assignees not being partners, a demand must be made upon each, in order to maintain a joint action.

A demand and refusal do not constitute a conversion of property. They are but evidence of a previous conversion.

A refusal to deliver property to the true owner, on demand, is evidence — in the absence of all explanation — that the party received it with intent to set the real owner's rights at defiance.

In such a case the jury will be justified in finding a conversion before suit brought, although the demand and refusal were not made until after the commencement of the suit.

A fraudulent purchaser of goods and assignees to whom he has assigned the same in trust for creditors, are liable to a joint action by the vendor, to recover the possession.

APPEAL from an order of the General Term of the third district affirming an order of the Special Term granting a new trial in this cause.

The action was for the claim and delivery of a quantity of steel which the plaintiffs claimed to have sold to one White,

upon the condition that he should pay for the same in his notes indorsed by a firm in the city of New York, and which condition had never been complied with, and hence title had never passed to White. The answer contained a general denial of the matters alleged in the complaint, and White for himself set up, by way of affirmative defense, that the sale to him was absolute, and that he assigned the steel to the other defendants. Miller and Ferguson, the other two defendants, allege that White became absolute owner of the steel, manufactured a part or the whole of it into axes, and disposed of the same before the 8th December, 1852, at which time he assigned and transferred what remained of said property to said defendants, who thereby became the absolute owners thereof.

On the trial the plaintiffs offered Joseph Stagg as a witness, and he was objected to as incompetent on the ground that he was one of the persons for whose immediate benefit the action was prosecuted. It appears he was one of the sureties in the undertaking given for the return of the property in the action. The objection was overruled, and defendants' counsel excepted. The plaintiffs then gave evidence tending to prove the sale to the defendant White, of 7138 pounds steel at the price of $1,072.95, upon the condition that it should be paid for by said White's note indorsed by Johnson, Cornwell & Co., and that the property was sent forward to said White at Troy, pursuant to his directions, subject to the aforesaid condition; that he received the property but never performed the condition. The purchase of the steel was made on the 26th October, 1852, and was shipped to Troy on the 27th or 28th October. There were negotiations between said White and the plaintiffs' agents at New York, by whom the sale was made, as to the terms of payment of the notes to be given for the steel, down as late as 13th November, 1852. On the 6th of November, the plaintiffs' agents wrote to Thompson, Gale & Co., at Troy, to stop the steel in their warehouse. On the 8th of November, Thompson, Gale & Co. telegraphed the agents that White had removed the steel on the 6th November to

Cohoes, where he was carrying on the business of making axes. On the 8th December, 1852, said White made an assignment of all his property for the benefit of creditors, to Miller & Ferguson, who took possession of the property and entered on the discharge of the duties under the said trust.

Soon after the plaintiffs' agents heard of said assignment, one of them went to the place of business of White, at Cohoes, and found Miller, one of the assignees, in the office. The agent inquired whether the steel sold by the plaintiffs was used, or in bulk and cases, unbroken. Miller replied that it was all cut up or used up. After some further conversation, the agent went into White's warehouse and found a box of the steel, weighing 1,700 lbs., unbroken. The agent then returned into the office, and requested Miller to deliver up the steel so found, stating the sale on conditions, and the non-performance thereof. Miller refused to deliver, wishing first to see his attorney. The officer then went to the warehouse, with purpose to get possession of the steel, and they went into the warehouse and took the 1,700 lbs. identified as the steel sold by the plaintiffs. The property was delivered to the sheriff about 11 A. M., and the demand of Miller was made about 1 P. M., of the same day. No demand was made of Ferguson at any time. Besides the steel so taken as aforesaid, there was other steel in the shop formerly carried on by White, cut up and partially made into axes; and it was so changed that its identity could not be traced. A witness by the name of Thorburn testified that he was plaintiffs' clerk and called on Miller about a week after the suit commenced and asked him to let him (Thorburn), and Frink (the deputy sheriff), look at the steel for the purpose of identifying that belonging to the plaintiffs. Miller refused to open the shop and let them go in. Testimony was given tending to show that steel of the description sold by the plaintiffs to White had been cut up and partly made into axes and sold by the assignees after suit brought. There was sold in all some 5,000 lbs.

The plaintiffs having rested, the defendant White moved to dismiss the complaint, on the ground that there was no evidence to show that any part of the property in question was in his possession or under his control when the action was commenced.

The counsel for Ferguson and Miller moved to dismiss the complaint on the ground that the steel was sold on the credit of Johnson, Cornwell, & Co., and not of White, and that no demand was made on either of the assignees till after the suit was commenced. Both motions were denied and the counsel excepted.

On the part of the defendants, the defendant White was called as a witness, and testified in substance that he had made an arrangement with Johnson, Cornwell & Co., dealers in steel, residing and doing business in New York, to furnish him with what steel he should want for some two years, and gave them a mortgage for some $30,000 to secure them; that in October, 1852, he applied to them for steel of a size which they did not have, and they told him to go amongst the dealers and get it. He accordingly called on the plaintiffs' agent and informed him of the arrangement with J., C. & Co., and that he was not bound to run round the streets after the steel. White and the plaintiffs' agent talked about his, (White's) buying ten cases. White told him he could give him the money for one case, and if it suited, could buy more. After getting home he sent for the case purchased, and his teamster told him there were ten cases at the warehouse. He afterward received the invoice for the ten cases. He subsequently commenced using the steel, and had used steel of the same size of that he got of the plaintiffs.

The defendants' counsel then asked the witness the following question: "When you bought the steel did you intend to pay for it?" The question was objected to, and the objection was sustained by the court, and the counsel for the assignees excepted. Other evidence was given on both sides, but none of it has any bearing on the questions of law arising on this appeal.

The court charged the jury, amongst other things, that the assignees proceeded to execute the trusts under the assignment, assuming control over all the property in White's factory. And that if they should be satisfied from the evidence that the sale was not an absolute one to White, and that no title passed to him, the plaintiffs would be entitled to recover. That if the evidence satisfied them that at the commencement of the suit there was a detention of the property in question by the defendants, the plaintiffs were entitled to recover.

The assignees asked the court to charge the jury that there was no evidence to warrant them in finding that the whole of the steel claimed in this action ever come to the possession or under the control of the defendants Miller and Ferguson. The court declined so to charge, but charged that it was for the jury to say from the evidence, what amount of the steel had come into the possession or under the control of M. & F., as assignees of White; to which the defendants' counsel excepted.

The court was also requested to charge that although they should find that the assignment from White, in its terms, embraced all his property, yet the assignees were not liable to account for any sum of the property assigned them, so much as was shown to have come into their actual possession, or under their control. The court declined to charge on the issue in relation to the detention of the property, further than already charged, and the defendants' counsel excepted.

The counsel for White requested the court to charge the jury that the plaintiffs could not recover against him for any steel not shown to be in his possession or under his control at the time of the commencement of the action, and that there was no evidence to warrant the jury in finding that White had either the possession or the control of the property at the time the suit was commenced, or at any time after the assignment. The court declined so to charge, and the counsel for White excepted.

The jury found for the plaintiffs, and assessed the damages for detention of the property at $902.78.

A motion was made at Special Term to set aside the verdict, and the same was set aside, and a new trial granted on the grounds:

1st. That the court should have charged as requested by the counsel for the assignees.

2d. That there was no evidence of a joint possession of the assigned property, or that White had anything to do with it after the assignment, and the plaintiffs could not recover without such proof.

3d. No new evidence of a joint conversion by White and the assignees.

4th. The assignees were not liable until after a refusal to deliver the steel upon a demand made.

The plaintiffs appealed from this order stipulating that judgment final might pass against them, if the order was affirmed by this court.

H. G. Wheaton, for the appellant.

J. K. Porter, for the respondent.

MULLIN, J. The first alleged error presented by the record in this case is the admission of Stagg as a witness for the plaintiff, he being, as it is claimed, a person for whose immediate benefit the action is prosecuted, having signed the undertaking required by the Code to be given in proceedings for the claim and delivery of property.

Stagg could derive no benefit whatever from the suit, except by being released from his undertaking. He had an interest which under the former practice would have excluded him from being a witness, until another undertaking was substituted. Interest is no longer a ground for exclusion. Stagg had no power as surety in the undertaking, to control the suit, nor to appropriate to his own use any part of its proceeds. The action was not prosecuted for his benefit directly or remotely. If a person can neither control the action nor appropriate its proceeds, it is difficult to understand how it can be said to be prosecuted for his benefit. The defendants' counsel seems to think that Stagg was to be

treated as if he had indemnified some person for the taking of the property. By section 209, of the Code, the undertaking is for the prosecution of the action, the return of the property, upon the payment to the defendant of such sum as may be recovered against the plaintiff. The sureties are to be approved by the sheriff, and he is liable to the defendants for the sufficiency of the sureties, until the objection to them is waived, or they have justified, or new sureties be substituted and been justified. The action not being against the sheriff, indemnity to him could not convert the surety into a person for whose immediate benefit the suit was prosecuted. And indemnity to the defendants in the action, could not work out any greater change in the relations of the witness to the action The case of *Howland* v. *Willett* (5 Seld., 170), has no application to the case. In that case the defendant was sued as sheriff, for unlawfully taking the plaintiff's property, and Edward Dwight was offered as a witness on the part of the defendant, and it appearing that he was a partner in the firm by which the judgment was recovered, on which the property in question was seized, and that the judgment had been assigned to said Dwight, and that he claimed the property and had indemnified the sheriff, it was held that he was a person for whose immediate benefit the action was prosecuted, and that he was, therefore, incompetent. There is no resemblance in the cases. The witness Stagg had not indemnified any person to the litigation, unless it was the defendant, and such indemnity does not affect the question of the competency of the indemnitor as a witness.

When the person offered as a witness is legally or equitably the owner of the property and entitled to its proceeds, or was entitled himself to the benefits of litigation by indemnity given to another, he is a person for whose benefit the action is prosecuted or defended. If he is a mere surety to enable another to prosecute or defend an action he is not a person for whose benefit the action is prosecuted or defended, and is not rendered incompetent as a witness under section 299 of the Code.

The counsel for the defendants Miller and Ferguson, on the close of the plaintiffs' case, moved to dismiss the complaint on the ground that the goods in question were sold upon the credit of Johnson, Cornwell & Co., and not of White, and that no demand was made on either of the assignees until after suit commenced. The motion was dismissed, and the defendants' counsel excepted.

The witness Stagg had testified, before the plaintiffs rested, that he was one of the plaintiffs' agents, and as such negotiated the sale to White; and that White offered to him as indorsers of his paper for the steel he might purchase the firm of Johnson, Cornwell & Co., and that he told White he would accept them as indorsers, and it was upon the condition that they should become such that the sale of the steel was made. It is a very grave mistake, therefore, to say that the sale was made on the credit of White alone, and not on that of Johnson, Cornwell & Co. also.

If the steel was held on a condition that was not complied with the title never passed from the plaintiffs, and White acquired no title thereto, nor could he convey any to the assignees. (*Acker* v. *Campbell*, 23 Wend., 372; *Sever* v. *Smith*, 1 Denio, 571; *Haggarty* v. *Palmer*, 6 Johns. Ch., 437; *Same* v. *Douw*, 1 Paige, 321; *Cory* v. *Hotailing*, 1 Hill, 311; *Smith* v. *Lynes*, 5 N. Y., 41; *Olmstead* v. *Hotailing*, 1 Hill, 317.)

In order to maintain an action against White, no demand was necessary. His act was tortious and he was liable in trespass for the unlawful taking. (*Farrington* v. *Payne*, 15 N. Y., 431.)

But as the assignees acquired possession of the property innocently, without notice of any defect of title in White, an action could not be maintained against them until after demand and refusal. (*Hall* v. *Robinson*, 2 Comst., 293.)

The assignees not being partners, a demand must be made upon each, in order to maintain a joint action. (*Mitchell* v. *Williams*, 4 Hill, 13.) It is not pretended that any demand was made of Ferguson, and hence the action as against him was not sustained. There was evidence sufficient to carry

the law to the jury on the question whether a demand was made of the property of Miller, and whether there was a refusal by him; and the jury must have found such demand and refusal, as without it there was no evidence of detention, by the assignees referred to by the judge in his charge to the jury.

I do not understand the respondents' counsel to contend that there was not a demand and refusal by Miller; but the objection is that it was after suit brought; the papers in the suit having been delivered to the sheriff at 11 A. M., and the demand not made till 1 P. M. of the same day.

A demand and refusal do not constitute a conversion of property. They are but evidence of a conversion, and the conversion of which they are the evidence is prior to the demand and refusal. (2 Phil. Ev., 226, Cowen and Hill's edition.) The learned authors say: "The refusal of the defendant may be evidence of a conversion at an antecedent period; as when deeds were in the possession of the defendant prior to Michaelmas Term, and the demand and refusal were proved to have been made on the day after that time, the court held it to be evidence of a conversion before the time." *Milton* v. *Endlestom* (5 Barn. and Ald., 87), was trover for certain deeds that were shown to have been in the defendants' hands before the Michaelmas Term. The bill was entitled generally of that term, the memorandum showed it was filed on the 28th November, but it was not in fact filed until the 24th December. The demand was made on the 29th November. The evidence of the actual time of filing was objected to as contradicting the record. But the court held it admissible; and they say a demand and refusal is evidence of a prior conversion; and as the deeds were in the defendants' hands prior to Michaelmas Term, there was evidence for the jury of a conversion before that period.

In *Morris* v. *Pugh*, (3 Bur., 1243), the same question arose as to whether the actual time of filing the bill could be shown in opposition to the recital in the record; and it was held that it might. And Lord MANSFIELD takes occasion to say: "Refusal upon demand is not an actual conversion, but

evidence of it. If the refusal on the 2d May had really been after the action brought I ought to have left it to the jury as evidence of a conversion before the bringing of the action."

In the case before us it is shown that the assignment was made and delivered on the 8th December. The action was commenced on or about the 17th December, and it was on the same day the demand was made. The demand and refusal was, under the cases cited, evidence to go to the jury of a conversion as early as the 8th December; that is to say, refusal to deliver to the true owner on demand, is evidence in the absence of all explanation that the party recovered it with intent to set the real owner's rights at defiance. The jury was justified in finding a conversion before suit brought. Miller is therefore liable to the plaintiffs for the value of the property.

It was held in *Nichols* v. *Michael* (23 N. Y., 264) that the fraudulent vendee of goods, and his assignee thereof for the benefit of creditors, are liable to a joint action by the vendor to recover the possession. White was therefore liable jointly with Miller and Ferguson for a conversion of the steel, and as to him no demand was necessary.

The court was requested to charge the jury, that there was no evidence to warrant them in finding that the whole of the steel claimed in this action ever came to the possession or under the control of the defendants, Miller & Ferguson. The court declined so to charge. All the steel sold by the plaintiffs to White was received by him and taken to his shop. There is no proof that he sold a pound of it, or that by the course of business in his shop a sale of any part of it might be inferred. As between the plaintiffs and White there could be no doubt but that at the time of the assignment he had in his possession all the steel bought of the plaintiffs. And it seems to me the inference is equally strong against the assignees. By the assignment they took all personal property, tools, machinery, etc., in the ax factory, and all iron, steel, stock and materials for being manufactured, and all axes and other edged tools manufactured or in process of

being manufactured, and stock partly manufactured, and all manufactured articles in the hands of commission merchants, or other dealers, etc., etc. If none had been sold by White, then all the steel was on hand in bars, manufactured, in process of manufacture, or in the hands of dealers. The plaintiffs gave all the evidence as to the possession of the property by the assignees, the nature of the case admitted of, and it was in the power of the defendants to prove beyond all doubt how much of it passed to them under the assignment. And failing to give any proof, I think the jury were justified in presuming that all the property purchased of the plaintiffs passed to the assignees. I am of opinion, therefore, that the branch of the charge under consideration was right.

The only remaining question is whether the question put to White, as to whether, when he purchased the steel, he intended to pay for it, was properly excluded. I think it was, for two reasons, viz.: 1. The inquiry is only competent when the intention of the witness at the time, and in relation to the subject-matter of the inquiry, is material. *Seymour* v. *Wilson* (14 N. Y., 56); *Griffin* v. *Marquart* (21 id., 121); *Forbes* v. *Miller* (25 id., 433.) There was no fraud imputed to White in making the sale, nor was there any issue in the pleadings as to a fraudulent intent, and hence a case was not made that rendered it either proper or necessary to inquire into White's intentions when he made the purchase. 2. White denied ever having made any contract with the plaintiffs' agents for the purchase of the steel. He says he talked with them about purchasing more than one box, but no agreement was made in relation to them, and he did not know that the plaintiffs' agents contemplated sending forward more than the single box until he was informed by his teamster that ten boxes were at Troy. Then, for the first time, did he assent to take the additional boxes. Whether he had an intention not to pay for property forced upon him, as he insists, by the plaintiffs' agents, could not be material, and the inquiry was properly excluded.

The result of my examination of this case is that the order as to Miller and White must be reversed, and that as to the

defendant Ferguson it should be affirmed, and judgment absolute under the stipulation in favor of Ferguson against the plaintiffs.

Judgment accordingly.

ISAAC J. VAN ALEN, Appellant, v. JOHN S. FELTZ, Respondent.

Title two of the Code of Procedure does not extend to cases where the right of action had accrued when that title became a law, but leaves them to be governed by the law then in force.

In such cases no written promise or acknowledgment is necessary to take a demand out of the operation of the statute of limitations. This case, reported in 32 Barb., 139, reversed.

THE action was brought by the plaintiff, as assignee upon two judgments rendered in a justice's court in favor of George W. Bulkley and Gersham Bulkley, against the defendant on the 18th of April 1846; one for $101.15, and the other for $76.15. These judgments were duly assigned to the plaintiff on the 31st of March, 1856. This action was commenced July 10th, 1856. The defense was the statute of limitations. The action was tried at the Columbia Circuit in September 1857, without a jury, by Justice D. WRIGHT, who found as matter of fact upon the evidence, that in June, 1852, the defendant in the judgments promised verbally to pay them both to the plaintiff, but made no promise in writing, and held as a conclusion of law that such promise did not take the case out of operation of the statute, and that the plaintiff could not recover. Judgment was therefore entered in favor of the defendant. The plaintiff appealed to the General Term of the Supreme Court, where the judgment was affirmed, and he brings his appeal to this court.

J. K. Porter, for the appellant.

J. H. Reynolds, for the respondent.

JOHNSON, J. When the Code went into operation, the right of action had already accrued upon both judgments, and the only question presented by the case, is, whether a written promise, in such a case, is necessary to take the demand out of the operation of the statute. No question is made but that the promise would have been sufficient before the Code. Section 110 of the Code provides that "no acknowledgment, or promise shall be sufficient evidence of a new or continuing contract whereby to take the case out of the operation of *this title*, unless the same be contained in some writing signed by the party to be charged thereby." This is the last section of title two of the Code, which relates to the time of commencing actions. The first section of this title, § 73 of the Code contains this provision. "*This title* shall not extend to actions already commenced, or to cases where the right of action has already accrued, but the statutes now in force shall be applicable to such cases, according to the subject of the action, and without regard to the form." The right of action having accrued upon these judgments, when this title of the Code became a law, such title did not extend to them, but left them to be governed by the law then in force. Such is the plain letter and reading of the provision, and I do not see that it is fairly susceptible of any different interpretation. It excludes a class of cases, embracing all upon which the right of action had already accrued. If the statute then in force had commenced running, all cases belonging to that class were left to the operation of such statute, and the provisions of title two of the Code did not in any way affect them. This precise point seems to have been decided by this court in *Winchell* v. *Hicks* (18 N. Y., 558, 566). In that case the note became due May 2, 1847, and the two sureties had by parol acknowledged the indebtedness at some time between that period and May 3, 1852; and one of the points ruled was, that the case did not come within the provisions of the Code, and the debt might be revived or continued without any written promise or acknowledgment. The point was ruled in the same way in the case in the Supreme Court (21 Barb.,

348) and the judgment was affirmed here. It had been previously decided, that where the statute had already run against a demand when the Code went into effect, such demand fell within the provisions of the Code, and could only be revived by a written promise. That to exclude it, the cause of action must have been subsisting. (*Esselstyne* v. *Weeks*, 2 Kern., 635.) The learned judge who delivered the opinion in the last case seems to have been of the opinion that section 73 of the Code applied only to cases where a cause of action had previously accrued upon a new promise. But that was not the point involved or decided. The point ruled was, that the section did not apply to a case where the statute had already run, and the cause of action which had previously accrued, was no longer subsisting. That decision was undoubtedly correct, as the provision was manifestly intended to exclude cases only where the cause of action had not only accrued, but was then subsisting, and the statute in force still running. In *Winchell* v. *Hicks*, the cause of action had accrued, and was subsisting, when the Code went into operation, and the parol promise was made afterward. It will be seen, therefore, that the precise question presented here, was involved in the latter case, and distinctly decided. The point is *res judicata*. But if it were an open question, I should have no hesitation in adopting the same conclusion. The language is too plain to admit of debate or doubt. "This title shall not extend to cases where the right of action has already accrued." To hold, in the face of this plain and unambiguous language, as we are asked by the respondent's counsel to do, that title two does extend to *all cases* where the right of action had already accrued when that title took effect, *excepting those only*, where such right had then been revived, or continued, by a new promise, would require the exercise of legislative instead of judicial functions. It would be a sheer perversion of terms, to call such a determination, the construction or interpretation of a provision of the statutes. I am of the opinion, therefore, that the judgment is erroneous, and should be reversed, and a new trial granted, with costs to abide event. Judgment reversed.

PHILIP PIKE v. EDWIN B. NASH and WM. H. PARDEE.

The defendants employed the plaintiff to cut down, prepare and transport to market, from a particular timbered lot, dock sticks of prescribed sizes, and spruce trees of certain dimensions, suitable for spars. In performing the work, some of the dock sticks being got out were smaller than the contract prescribed, and the spruce trees cut were of an inferior size and quality. The defendants looked on in silence, raising no objection, and both the dock sticks and spars were delivered and accepted at New York, under the contract, and remained in the defendants' possession until sold, without a word of disapprobation because of any deviation from the agreement.

Held, that under these circumstances it was not for the defendants to insist that they were absolved from making full compensation to the plaintiff for his labor, because some of the dock sticks did not strictly conform in size, nor the spars in quality, to the contract.

Where one party to an agreement assents to work as it is being performed by the other, and with a knowledge of a deviation from the strict letter of the agreement, fails to make any objection, he cannot afterward make such deviation a ground of refusal to perform on his part.

A party agreeing to cut, prepare and transport to market dock sticks, spars, etc. for another, is not, while transporting the timber, acting as a common carrier and his duty extends no further than to the exercise of ordinary prudence, care and skill in protecting the property from loss or damage.

For a loss caused by an unusual flood, by mere casualty, against which ordinary prudence and diligence could not protect, and without any lack of care or skill on his part, he is not liable.

THE defendants having purchased the standing trees on a lot of land in the county of Saratoga, agreed with the plaintiff to cut, prepare and transport to the New York market for them, from the lot, dock logs and piles of specified sizes. The dock sticks were to be either 31, 36 or 41 feet in length, and not less than seven inches in diameter at the small end; and the piles fourteen inches in diameter at the large end, and from forty-five to fifty feet long. For cutting, preparing and transporting to New York each dock stick the plaintiff was to be paid one dollar and twelve and a half cents, and for each pile two dollars and twenty-four cents. It was also agreed that the plaintiff should cut down, prepare and transport to the New York market all the nice, handsome spruce trees on the lot suitable for spars, and more

than fourteen inches in diameter at the butt, and as a compensation therefor, the plaintiff was to be owner of an undivided half of the spars when they reached the city of New York. Under this agreement, in the spring of 1854, the plaintiff cut down, prepared and transported 863 dock sticks, 136 piles and 315 spars. They were all in one raft, but in distinct cribs or lockings. The defendants had authority from the plaintiff to sell his undivided interest in the spars, but were not authorized to sell the same in conjunction with the dock logs and piles. In October following the arrival of the raft in the New York harbor, the defendants, after having diligently and in good faith attempted to sell the spars separately, but without success, sold at a single sale, and to one person, the entire mass of dock logs, piles and spars at the price of $1.62½ each, and by count, without any measurement or discrimination as to the relative value of the same or any part thereof, although the average actual value of the spars was five dollars each. Some of the dock logs were smaller than the dimensions prescribed for them by the contract; but whilst they were being cut and after they reached New York, the defendants, having sufficient opportunity to inspect and ascertain such deficiency as to size, at neither place, or at any other time or place made any objection thereto. Nor with like opportunity of inspection and examination of the spars whilst they were being cut and prepared for market, or at New York, or elsewhere, before the sale, did they make any objection to their quality, though the largest of them were, without any improper intention on the part of the plaintiff, of inferior quality, whereby the average value of them in new York was reduced to five dollars per spar. In an action upon this contract the plaintiff was allowed by the referee the contract price for getting out and delivering to the defendants at New York the dock logs and piles, and one-half the market value of the spars at the time they were sold. This, it was insisted, was error. And the judgment entered upon the report of the referee having been affirmed by the General Term of the Supreme Court, the defendants appealed.

John H. Reynolds, for the appellants.

D. L. Seymour, for the respondent.

WRIGHT, J. The dock sticks, by the terms of the contract, were to be of specified length, and not less than seven inches in diameter at the small or top end; and the spruce trees on the lot, over fourteen inches in diameter at the butt, and suitable for spars were to be cut and transported to the New York market on shares. Some of the dock sticks (but how many is not found) were not so large as the contract prescribed, and the largest of the spars (how many is not known) on being inspected and tested, after transportation, were found to be of inferior quality. It is because the contract was not strictly performed in respect to the size of all the dock sticks, and to the quality of all the spars, it is now urged that the plaintiff is not entitled to recover anything for his work, or if anything, not the full contract price. It may be conceded that the position would be sound, if the defendants had not waived a strict performance; but it is clear, in this case, that they assented to and acquiesced in whatever deviations there were from the contract, either in the size of the dock sticks that were under the size prescribed, or in the quality of the larger spars for the purposes intended, which the referee finds (and it is only upon his findings that any question of non-performance by the plaintiff can be raised), that some of the dock sticks were smaller than the contract called for, and the largest of the spars were of inferior quality, owing to knots and galls in the material on which the plaintiff's labor was employed; in connection therewith, he further finds that the defendants made no objection to the dock logs, or to the spars, got out in the execution of the contract, either while they were being cut down and prepared for market, or before or after they were accepted and sold by them, although they had sufficient opportunity, both on the lot and at New York, to inspect and ascertain the deficiency as to size of said dock logs that were smaller than the dimensions prescribed by the contract, and of the quality of the larger spruce logs designed for spars. They employed the plaintiff to cut down, prepare

and transport to market from a particular timbered lot, dock sticks of prescribed sizes, and spruce trees of certain dimensions suitable for spars. In performing the work, some of the dock sticks being got out, are smaller than the contract prescribes, yet the defendants look on in silence having no objection on that account, so, also, they look on without objection to the spruce trees that the plaintiff selects, and which he cuts down and prepares for spars. Both the dock sticks and spars are delivered and accepted at New York under the contract, remaining in the defendants' possession until sold without a word of disapprobation because of any deviation. Under these circumstances, it is not for the defendants to insist that they are absolved from making full compensation to the plaintiff for his labor. After having knowingly acquiesced in the cutting and preparation of the mass of dock sticks that did not strictly conform in size, and of the spars that did not conform in quality, to the contract, it is too late for them to urge that the plaintiff ought not to recover, because there has been a failure in these respects to perform on his part. They assented to the work as it was being performed, and with knowledge of the deviation from the strict letter of the agreement now complained of, when they could have put a stop to it; and the referee, therefore, was right in holding, as he did substantially, that the plaintiff was entitled to recover the contract prices.

It appears that while transporting to New York the dock sticks, piles and spars cut upon the lot the plaintiff lost on the way 132 sticks. This loss was caused principally by reason of an unusual flood, by mere casualty, against which ordinary prudence and diligence could not protect, and without lack of care or skill on the part of the plaintiff. The referee held that the plaintiff was not liable for this loss. This was correct. It was occasioned by the flood, and not by any carelessness or improper conduct of the plaintiff. He was not acting in the premises as a common carrier; and his duty extended no farther than to the exercise of ordinary prudence, care and skill in protecting the property from loss or damage. The judgment should be affirmed.

INGRAHAM, J. The main ground of defense was a claim for damages set up by the defendants against the plaintiff for having cut and removed logs and piles of a less size than contemplated by the original agreement. No objection appears to have been made that the whole number had not been delivered. The defendants, having had the opportunity to examine the logs while in the woods, and afterward at New York, and having accepted them at the latter place, cannot afterward deny their liability to pay for them, whatever the services were worth which the plaintiff had rendered. Those services were rendered under the contract between the parties, and the terms of that contract would settle the amount to be paid, unless it was shown that in consequence of the variation in size the compensation should have been diminished. (*Sickles* v. *Patterson*, 14 Wend., 257.) But in such a case the defendants should furnish evidence of any damages they had sustained. Having received the logs at the place of delivery and sold some without objection, they must be considered as waiving the objection which might have been made to their size, although they might have shown the value of the services rendered to have been less than the contract price. There is no such evidence, and for aught that appears in the case the referee might have concluded there was no difference in the value of the services rendered from that specified in the contract, and that the defendants had, by acceptance of the property, waived any claim therefor.

The second point of the appellants is that the referee erred in allowing the plaintiff the value of one-half of the spars. What was the value and whether the defendants sold them according to the terms of the agreement, was a question of fact for the referee. He evidently has found against the defendants on the ground that the spars should have been sold by themselves, and that they could not be used by selling them with the dock logs and piles to increase the value of the latter at the plaintiff's expense. There was evidence given of their value, ample to sustain the finding of the referee on this branch of the case. Even if the spars were

not of the size originally contracted for, if when they were delivered and accepted by the defendants they would have sold for the sum allowed by the referee, the plaintiff would have been entitled to one-half for his services.

The defendants, on the trial, seem to have considered themselves entitled to recover from the plaintiff, as damages, the difference between the sticks as delivered and the value of them if they had been of the size stated in the contract. This they would not have been entitled to if on receiving the logs with knowledge of the variance from the contract they had waived their right to insist upon a full performance of the contract. The referee has found such waiver.

The plaintiff was not a common carrier in regard to the property he was transporting. He was required to use care and skill in the discharge of his duty, but was not liable for loss arising from severe storms or floods. There is nothing to show that the plaintiff ever acted as a common carrier; on the contrary, this appears to have been a special contract, made in reference to this special property, and there is no ground to suppose that the plaintiff had ever been engaged in similar business. There was no error in this respect.

Although the defendants might have reduced the recovery against them by evidence, showing the value of the services rendered to have been less than the contract price, yet, not having done so, and having waived the objection by accepting the logs and selling them without any notice to the plaintiff, there is no ground on which this court could interfere.

The judgment should be affirmed.

MULLIN, J., and DENIO, Ch. J., were for reversal; all the other judges being for affirmance,

Judgment affirmed.

GEORGE CRICHTON, Plaintiff in Error, v. THE PEOPLE, etc., Defendants in Error.

The plaintiff in error was indicted under the statute of 1845, making it criminal for a "person to advise or procure any pregnant woman to take any medicine, drug, substance, etc., with the intent thereby to procure the miscarriage of any such woman." The first count of the indictment charged that the defendant, on, etc., at, etc., did then and there advise and attempt to procure, and did procure, one E. D. to take certain medicines. etc., viz.: certain pills, known, etc., with intent, etc. The second count charged that "heretofore, to wit, at the time and place aforesaid, one E. D. was then and there a pregnant woman;" that the accused, "for the purpose and with the intent to cause and produce" her miscarriage, "did advise and procure her," the said E. D., *then and there* to take certain drugs, etc.

Held, that the second count was not bad for want of a sufficient venue.

Held, *also*, that conceding that the second count was defective, that would not be fatal, on a general verdict of guilty, if the first count was good.

The averment in the first count was that the prisoner advised E. D., to take certain medicines, drugs and substances, to wit, certain pills known as Dr. *James* Clark's female pills; and the evidence was that he bought a bottle of Dr. Clark's female pills, and told her to take them, etc. *Held*, that the allegation was substantially proven, if it was not to be regarded as surplusage.

The evidence showing the prisoner to have done everything averred in the first count, excepting that the pills recommended were Dr. Clark's pills, instead of Dr. James Clark's pills; also that the prisoner had purchased Sir James Clark's pills at the place where he told E. D. he had purchased them; *Held*, also, that if it had been necessary to show that the pills he recommended were Dr. *James* Clark's pills, the evidence was ample to submit to the jury the question whether it was this particular medicine the prisoner recommended.

THE plaintiff in error was indicted for advising one Elizabeth Dixon to take certain medicines to produce an abortion upon her. The indictment contained two counts. The first count charged that the prisoner, late of Oswegatchie, in the county of St. Lawrence, on the 22d of June, 1861, at the town of Oswegatchie, and at divers other times did then and there advise and attempt to procure, and did procure, one Elizabeth Dixon to take certain medicines, drugs and substances (to wit, certain pills, known as Dr. James Clark's female pills), which the said George Crichton then and there produced for the purpose and with the intent of procuring the

miscarriage of her, the said Elizabeth, etc. The second count charged that at the time and place aforesaid one Elizabeth Dixon was then and there a pregnant woman; that the said Crichton, for the purpose and with the intent to cause and produce the miscarriage of her, the said Elizabeth Dixon, she being such pregnant woman as aforesaid, did advise and procure her, the said Elizabeth, then and there to take certain drugs, medicines, substances or pills, etc.

Upon the trial of the cause the counsel for the accused moved to strike out the second count of the indictment on the ground that the same did not charge an offense, because it did not allege the time when or place where the advice was given, or where the prisoner did procure the said Elizabeth to take the medicines alleged, etc. This motion was denied by the court, and the prisoner's counsel excepted.

Upon the trial it appeared by the testimony of Elizabeth Dixon that she was pregnant; that she told the prisoner of her condition; that he got a bottle of Dr. Clark's female pills and told her to take them, and she would be all right; that she took some of them without effect; that the prisoner then got a box of Dr. Fenton's pills, and said if she would take it it would cause her to have no child; that he then got a bottle of other medicine, and told her it was sure cure if taken as directed. In the course of the trial the counsel for the prisoner asked one Lytle whether he had sexual intercourse with Elizabeth Dixon during the spring of 1861, which was objected to by the district attorney and excluded, to which the counsel for the prisoner excepted. After the evidence was closed the counsel for the prisoner made a motion to discharge the prisoner on the ground that there was no evidence to support the first count of the indictment, and that the second count was defective for the reason that it did not state the time when or place where the offense was committed, and that it was not charged in the said second count that the offense, if any, was committed within the jurisdiction of the said court. The court denied the motion, and the prisoner's counsel excepted. The cause was then submitted to the jury, who found a general verdict of

guilty. The prisoner moved, in arrest of judgment, for the cause aforesaid. The court ordered and directed that the prisoner's counsel should have leave to make a case, in order that the said several questions might be passed upon by the Supreme Court, and that judgment in the mean time be suspended. The cause was carried to the Supreme Court, and a new trial was denied at a General Term held in the fourth judicial district, in January, 1864, and the prisoner removed the case into this court by writ of error.

Myers & Magone, for the plaintiff in error.

B. H. Vary, district attorney, for the people.

INGRAHAM, J. There was no error in excluding the inquiry put to Lytle as to his connection with Elizabeth Dixon. It was immaterial whether any other person had connection with her or not. The offense charged was the advising means to produce an abortion, and would have been the same whether the prisoner or Lytle was the father of the child.

The main question in the case is whether the court erred in refusing to strike out the second count in the indictment, and, if such refusal was erroneous, whether the verdict can be sustained notwithstanding such refusal.

The objection to the second count is that there is no time or place averred at which the offense is charged to have been committed, so as to show that it was within the jurisdiction of the court. This count charges that at a certain time and place the said Elizabeth Dixon was pregnant, and that the defendant, with intent to cause and produce her miscarriage, did advise and procure her, then and there, to take, etc. The objection to this count is that the words "then and there" should have been inserted prior to the allegation of advice and procurement, and not as to the taking and use of the medicines. The ordinary interpretation of this count would be that the advice was given at the time when Elizabeth was averred to be there, and when it was averred that she was to take the medicine advised and procured to be taken. It was all in the same tense, and related to the same

moment of time. The charge was that she was then pregnant; that the prisoner advised and procured her, then and there (that is, at the time before mentioned, viz., when she was there pregnant), to take the medicines. All the acts charged relate to the same time, and the application of the rule that certainly to a common intent is sufficient, would be enough to sustain this count.

But, conceding that the second count was defective, that would not be fatal if the first count was good. (*People* v. *Wiley*, 3 Hill, 194; *Kane* v. *The People*, 8 Wend., 210; *The People* v. *Gilkinson*, 4 Parker, 26–29.)

The first count is conceded by the prisoner's counsel to be good, but he contends that the evidence could not apply to it. The averment is that the prisoner advised Elizabeth Dixon to take certain medicines, drugs and substances, to wit, certain pills, known as Dr. James Clark's female pills, and the evidence was that he bought a bottle of Dr. Clark's female pills, and told her to take them, etc.

There can be no doubt if the nature of the medicines had not been stated under a *videlicet* the cost would have been amply sufficient and the evidence would have sustained it. It has been held that whatever is not necessary to constitute the offense may be treated as surplusage.

This is particularly the case where the offense is statutory, and in such a case it is always sufficient to charge the offense in the words of the statute, although more particularity is required in bringing the offense within it, where, as in this case, more words are used than are necessary to make out the offense; I think the remaining may be rejected as surplusage. Various cases to this effect may be found in 2 Wharton's Cr. Law, 626.

But I think the allegation was substantially proven, if it was not to be regarded as surplusage. The evidence showed the prisoner to have done everything averred in this count, excepting that the pills recommended were Dr. Clark's pills, instead of Dr. James Clark's pills, and there was also evidence to show that the prisoner had purchased Sir James Clark's pills, at the place where he told Elizabeth Dixon he

had purchased them. If it had been necessary to show that the pills he recommended were Dr. James Clark's pills, the evidence was ample to submit to the jury the question whether it was this particular medicine the prisoner recommended, and upon this point their finding is against the prisoner.

There is no ground for interfering with the judgment of the General Term.

The judgment should be affirmed and proceedings remitted to Sessions.

WRIGHT, J. It is not claimed that the conviction is erroneous, if the second count of the indictment is good. This count it is contended on behalf of the defendant, is bad for want of a sufficient venue. I am not able to see this defect.

The defendant was indicted, under the statute of 1845, making it criminal for a "person to advise or procure any pregnant woman to take any medicine, drug, substance or thing whatever, with the intent thereby to procure the miscarriage of any such woman." (Laws of 1845, chap. 260, § 2.) The first count of the indictment charged that the defendant, on the 22d June, 1861, at the town of Oswegatchie, in the county of St. Lawrence, did then and there advise and attempt to procure, and did procure, one Elizabeth Dixon to take certain medicines, drugs and substances, viz.: certain pills known as "Dr. James Clark's Female Pills," with intent, etc. The second count charged "that heretofore, to wit, at the time and place aforesaid, one Elizabeth Dixon was then and there a pregnant woman; that the said George Crichton, for the purpose and with the intent to cause and produce the miscarriage of her, the said Elizabeth Dixon, she being such pregnant woman as aforesaid, did advise and procure her, the said Elizabeth, then and there to take certain drugs, medicines, substances or pills, to the jurors aforesaid unknown."

The criticism of the defendant's counsel upon this count, I think, has nothing of substance in it. He concedes that if the allegation had been that the defendant "did *then and*

there advise and procure the said Elizabeth Dixon *then and there* to take," etc., the count would have been good; but contends that as it stands, the giving of the advice and procuring her to take (the only acts of the defendant constituting the crime charged), are without venue of time or place. If this were the fair construction, it would be fatal; for time and place must be attached to every material fact averred. But it is hypercritical. The time and place of advising and procuring are stated, as will be seen by reading the count, omitting the adjunctive and parenthetic clauses showing the condition of the woman. It would then read: "heretofore, to wit, at the time and place aforesaid (that is, at Oswegatchie, on the 22d June, 1861), George Crichton, did advise and procure her, the said Elizabeth Dixon, then and there to take," etc. Unless the time and place first mentioned in the count refers to the advising and procuring, they do not refer to any thing.

Being of opinion that the second count is not defective in the particular suggested, it is unnecessary to pursue the further inquiry whether the defendant was properly convicted on the first, which is conceded to be unobjectionable.

The judgment of the Supreme Court should be affirmed.

All the judges concurring,

Judgment affirmed.

FREDERICK LEWIS and others, Executors, etc., Appellants, v. JOSEPH R. INGERSOLL and others, Respondents.

This court will not review a case upon the exceptions to findings of fact, or the omission to find other facts not found.

The promise of an agent of mortgagees, that he will assume and allow a payment made by a tenant, to a clerk or servant of the agent, upon the bond and mortgage, as a good and valid payment to his principals, when he has no authority from his principals to make any such promise on their behalf, and he never did allow it, or account to the mortgagee for the money, is but the individual promise of the agent, and in no respect the promise of the mortgagees, nor binding upon them.

Nor will such promise estop the mortgagees from insisting that the payment was never made.

A payment of money intended to be applied upon a bond and mortgage, to a clerk or servant of the mortgagees' agent, the receiver not being an agent, clerk or servant of the mortgagees, and never having acted as such, is not in legal effect a payment to the agent and so a payment to the mortgagees.

When an agent undertakes to act, or do his business, by or through another, the acts of such other are not the acts of the principal, unless the agent had authority to employ or appoint others.

Acts merely mechanical, an agent may employ others to perform, having first determined that such acts are necessary or proper to be performed. But not so with acts involving the exercise of a discretion, or anything of the character of a trust, which is in its nature personal to an agent.

In such cases the agent has no right to turn the principal over to another, of whom he knows nothing. The maxim is, *delegatus non potest delegare.*

The authority to an agent, from a principal, to receive money, is most clearly a personal trust and confidence, which cannot be delegated without certain and plain authority.

Where a mortgage upon lands situated in this State, is executed here — it not appearing where it is made payable — and there is nothing to indicate that a rate of interest different from that allowed by the laws of New York was intended by the parties, the law of the place where the contract was made governs, as to the rate of interest.

Where letters were produced and identified by a witness, and although he had forgotten the facts therein stated, he was able to say, in substance, that the contents of the letters were undoubtedly true at the time they were written, although he was then unable to remember them; *Held*, that they were admissible as auxiliary to the testimony of the witness, and as memoranda made by him of a then existing state of facts.

THE action was brought to compel the defendants to discharge and surrender a certain bond and mortgage in their

hands, and to have the mortgage canceled of record on the ground that the debt had been paid and satisfied. The lands in question are situated in the county of Broome, in what is known as the Bingham patent. The bond and mortgage in question were executed on or about the 19th of June, 1826, to secure the payment of $4,664.66 by installments. The plaintiffs' testator, Hazard Lewis, was the owner of the premises in fee, and commenced the action in his lifetime; alleging, in his complaint, that the mortgage debt had been fully paid and satisfied, but that the defendants claimed a large amount to be due thereon, and threatened to foreclose if the same was not paid; that the mortgage remained a cloud upon the plaintiffs' title and prevented a sale and conveyance of the premises; and praying for the relief above mentioned. He admits that if anything is due he is personally liable, and consents that a decree may be entered against him in the action, if anything shall be found due on said bond and mortgage, for the amount so due.

The defendants, in their answer, admit that the whole amount has been paid except the sum of $511.96, with interest thereon from and after December 11, 1843; which they claimed to be still due and unpaid. The action was tried at the Broome Special Term, in April, 1860, before BALCOM, Justice, without a jury. The said justice found, as conclusions of fact from the evidence, that in the year 1843 sufficient payments were made to satisfy the whole amount due on said bond and mortgage, except the interest which was due thereon on the first day of June, 1830. That on the last mentioned day, there was due for interest thereon $326.53, which was never paid, or received by the trustees of the Bingham estate, who held said bond and mortgage. He further found that on the 29th of November, 1830, the mortgaged premises were owned by Virgil Whitney and David C. Case, as tenants in common, and that on that day the latter paid to the former $326, as and for the interest which became due on the first of June preceding. That Joshua Whitney, of Binghamton, was the general agent of

the trustees of William Bingham, from and prior to 1824, until the time of his death, in 1845; and that during all this time, and subsequent thereto, the said trustees resided in the city of Philadelphia. That from about the year 1829 until the year 1835, the said Virgil Whitney acted from time to time as a clerk or servant of Joshua Whitney at Binghamton, in correspondence, drawing contracts, deeds, bonds and mortgages, and in receiving money for said trustees; but said Virgil Whitney was never an agent, clerk, or servant of said trustees, and never acted as their agent, clerk, or servant. That Virgil Whitney, from the year 1825 up to 1836, had been in the habit of receiving money from time to time of persons who owed said trustees on contracts and on bonds and mortgages, and that he generally carried such money for such persons to Philadelphia, and there paid the same for them to said trustees. That said Virgil Whitney never paid the said sum of $326 received by him of Case on the 29th of November, 1830, to the said trustees, or to Joshua Whitney, or accounted therefor to any other person. That Virgil Whitney was never authorized by said trustees to receive money for them, and that the money he did receive for them at any time was taken by him either as a clerk or servant of said Joshua Whitney, or for the accommodation of the persons from whom he received the same. That the bond and mortgage in question were never in the possession of Joshua Whitney, and that he never received any payment thereon from any one; but that all the payments made thereon were made to the trustees personally at Philadelphia, other than this sum of $326 paid by Case to V. Whitney. That in the year 1835 or 1836, and prior to the 8th day of February, in the latter year, Joshua Whitney, in a conversation with the plaintiffs' testator in reference to a purchase by the latter of the interest of Virgil Whitney in said mortgaged premises, promised the said testator that he would assume and allow the said sum of $326 paid by Case to V. Whitney, as a good and valid payment to said trustees on said bond and mortgage, and that thereafter, and on the said 8th of February, 1836,

said testator purchased of V. Whitney, his interest in said premises and paid him a valuable consideration therefor and took a conveyance. That said Joshua Whitney had no authority from said trustees to make said promise, and never allowed the said sum as a payment, and never accounted to the said trustees for the same. That Virgil Whitney was never held out by Joshua Whitney as an agent of said trustees; and that Joshua had no authority, express or implied, to authorize Virgil to receive money for them so as to charge them therefor while the same was in the hands of Virgil. That prior to the year 1835 Joshua Whitney did not know of the payment of this sum of $326 by Case to Virgil. That by reason of the non-payment of the interest that became due on the first of June, 1830, there was then remaining due and unpaid on said bond and mortgage the sum of $1,040.39. As conclusions of law from the said facts the said justice held and determined that the said bond and mortgage were not paid and satisfied, but that said mortgage was still a valid and subsisting lien on the premises for the amount so found due; and in pursuance of the consent in the plaintiffs' complaint, ordered judgment against him for said sum of $1,040.39 with costs of the action, and that upon payment thereof the said bond and mortgage should be canceled.

In the course of the trial, the plaintiff called as a witness, Christopher Eldredge, one of the persons who executed the bond and mortgage in question, and upon his cross-examination by the defendants' counsel, a letter purporting to have been written by witness to trustees, dated Sept. 30th, 1834, was submitted and identified. Witness says, "I wrote the letter; I don't remember seeing the statement of Aug. 20, 1834; I have no doubt but that I did what I said in the letter I did; I presume I did so; I have no recollection of it aside from the letter." Plaintiff's counsel objected to the letter of witness to Miller as a memorandum or otherwise, witness saying he has no memory of it whatever, but what the letter says. Received under objection and exception taken, and letter read under objection.

"BINGHAMTON, *Sept. 30th*, 1834.

"WILLIAM MILLER, Esq.:

"*Dear Sir*—Yours of the 20th ult., with my bond and mortgage, and power of attorney, etc., was duly received, and I will now attempt to make an apology for my seeming negligence in answering it. At the time I received the package, Col. Lewis and Mr. V. Whitney were both absent, and I expected them soon, they however did not arrive here till last week; I immediately called on them and showed them the statement of interest, and told them that payment must be made without delay,—and that the trustees knew nobody else to look to for payment but myself and Mr. Collier; and therefore, Mr. Collier and myself were placed in an unpleasant situation, and that it was entirely owing to your unlooked for indulgence, that we had not been prosecuted. These gentlemen have given me the strongest assurances that they will immediately make provision for the payment of at least the interest. I will do myself the honor of making a further communication to you soon, if Messrs. Lewis and Whitney do not make immediate payment of at least the interest.

"Your obedient servant,

"CHRISTOPHER ELDREDGE."

"I don't remember receiving a letter from Miller to which I wrote the answer." A letter of Miller to Eldredge and Collier offered by the defendants' counsel and objected to by the plaintiffs' counsel, but admitted and read under objection and exceptions.

"PHILADELPHIA, *August* 20, 1834.

"CHRISTOPHER ELDREDGE & JOHN A. COLLIER, Esqs.:

"*Gentlemen*—I have the pleasure of annexing a statement of your bond account, as it appears on the books of the trustees of the estate of the late W. Bingham, Esq.—balance of principal and interest on 1st June last, $6,297 31-100, for which we will thank you to provide payment. You will perceive that we are heavy sufferers by the delay which has taken place in the interest. If that is cleared off forthwith, we are content to wait a convenient time for the principal,

it being understood that the payment of interest shall be punctually attended to.

"Your obedient servant,

(Signed) "WM. MILLER,

for the trustees, estate of W. B."

CHRISTOPHER ELDREDGE and JOHN A. COLLIER, Esq'rs,

DR.

For the am't of their bond payable in 5 years from 1st June, 1826, with interest payable annually,		$4,664 66
The following payments being on account of interest:		
One year to 1st June, 1827,	$326 53	
" " 1828,	326 53	
" " 1829,	326 53	
For interest in arrears, to wit:		
Due 1st June, 1830,	326 53	
" " 1831,	326 53	
" " 1832,	326 53	
" " 1833,	326 53	
" " 1834,	326 53	
		1,632 65
Bal. principal and interest due 1st June, 1834,		$6,297 31

Six thousand two hundred and ninety-seven dollars and thirty-one cents.

[Letter from witness to Wm. Miller, trustee, received under objection and exception.]

"BINGHAMTON, *February* 7, 1838.

"WILLIAM MILLER, Esq., trustee of the estate of the late Wm. Bingham, deceased:

"*Dear Sir* — On the 4th of August last I inclosed in a letter to you, the now inclosed draft and certificate of deposit, amounting together to $750, as payment on account of interest due on a bond against myself and John A. Collier, Esq., to the trustees, which bond Col. Hazard Lewis became obligated to pay. Col. Lewis regrets that it is not in his power at this time to forward to you at least the whole amount of

the interest due on the bond, and desires me to say to you that he is not unmindful of the importance of immediately paying at least all the interest, and that the balance shall be paid in May or 1st June next and as much of the principal as possible. I have no doubt he will perform what he states. The letter of the 4th of August last, found its way to the general post-office at Washington, where it lay till the 26th of January, and was then sent to the postmaster of this village. I will thank you to indorse the amount upon the bond and advise me or Col. Lewis of the receipt of it.

"Truly, your obedient servt,

"CHRIS'R ELDREDGE."

Jas. Hunt, Cash. Manu. and Mech. Bk., 6th July, 1837—400 dls—order of Hazard Lewis, Esq.,—C. Murdock, Cash. Binghamton, Broome Co. Bk., 4th Aug., '37, or Cash. Mech. and Farmers' Bk., Albany, to order ch. C. Eldredge, Esq.—350.

The above letter received under objection and exception.

I wrote it but don't remember anything about it.

Question by defendants' counsel: Would you have written the letter if it had not been true?

The plaintiffs' counsel objected to the question.

Overruled, and the plaintiffs' counsel excepted.

Ans. I presume that what I wrote was true, as I understood it.

Ques. Have you any doubts it being true?

The plaintiffs objected.

Overruled; plaintiffs except.

Ans. I cannot say that I have.

Letter offered in evidence by defendants. The plaintiffs' counsel objected in due time to the letter dated February 7, 1838, but it was admitted and read under objection. The plaintiffs' counsel further objected that the letter states an alleged conversation with Lewis—what it is pretended Lewis told him—but the entire letter was admitted under objection. Witness says: I have looked once for letters from the trustees of the Bingham estate, and found

none; there was a difficulty about a bridge here when there was an unfriendly feeling between Gen. Whitney and me.

The plaintiffs' counsel filed and served exceptions to nearly every conclusion of fact, separately, and also for the omission to find various other facts which it was claimed ought to have been found from the evidence, and also to the several conclusions of law, separately, and especially to the allowance of seven per cent interest on the bond and mortgage instead of six per cent allowed by the laws of Pennsylvania. The plaintiffs appealed from the judgment, to the General Term of the Supreme Court, where the same was affirmed, and from that judgment appealed to this court.

D. S. Dickinson, for the plaintiffs.

Hotchkiss & Seymour, for the defendants.

JOHNSON, J. Upon the facts established by the findings of the court, it is impossible for the plaintiff to maintain this action. It is unnecessary to repeat here that this court will not review the case upon the exceptions to findings of fact, or the omission to find other facts not found. This has been so often and so uniformly asserted as the rule, that the occasion for re-asserting it ought no longer to be permitted and passed upon by us.

The $326 claimed to have been paid upon the bond and mortgage, were never received either by the defendants personally, or by their agent, Joshua Whitney. The bond and mortgage were never in the possession of the agent, but were always in the hands of the defendants, who received personally, or at their office in Philadelphia, all the moneys ever paid thereon.

There is no dispute as to the fact that the amount in question was paid by Case, then a part owner of the premises, to his co-tenant Virgil Whitney, for the purpose of having it applied upon the bond and mortgage, nor that it was received by Virgil Whitney to be so applied. But the application never having been in fact made, nor the money handed over, by Virgil, either to Joshua Whitney the agent, or to the

defendants, the question is whether the law will make the application. It is quite clear that this money, while it remained in the hands of Virgil Whitney could be no payment, unless he was authorized by the defendants to receive the same for them on that account, or they have in some way agreed to apply it since it was so received. The fact is distinctly found that Virgil was never authorized by the defendants to receive any money for them as their agent; and Joshua Whitney has only agreed that the amount so paid should be applied. It is quite certain, therefore, that the mere payment of the money to Virgil Whitney was in law no payment or satisfaction of the debt for that amount.

In respect to the promise of Joshua Whitney that this amount thus in the hands of Virgil he would assume and allow as a good and valid payment to the defendants, the fact is established that he did make such promise, but the further fact is also found that he had no authority from the defendants to make any such promise on their behalf, and that he never did allow it, or account to the defendants for the money, or any part thereof. The promise was but the individual promise of Joshua Whitney, and in no respect the promise of the defendants, nor binding upon them.

The position assumed and urged with so much earnestness and apparent confidence by the plaintiffs' counsel, that the payment of this $326 to Virgil Whitney was, upon the facts found, in legal effect a payment to Joshua Whitney, the agent, and so a payment to the defendants cannot be maintained. The finding in this respect is, that Virgil, for the period of about nine years, acted from time to time as a clerk or servant of Joshua, his father, who was the agent, in correspondence, drawing contracts, deeds, bonds and mortgages, and receiving money for the defendants, but was never an agent, clerk, or servant of the defendants, and never acted as such. As to the defendants, therefore, Virgil Whitney was a mere stranger, and they were no more bound by payments to him than by payments to any other person. He acted from time to time, not uniformily or constantly, as the clerk or servant of the agent. He was the clerk, or servant,

or agent of the agent, but not of the principals. The principal is bound by the authorized acts of his agent. Such acts are his acts, and it is upon that principle alone that he is bound. But when the agent undertakes to act or do his business by or through another, the acts of such other are not the acts of the principal, unless the agent had authority to employ or appoint others. Acts merely mechanical an agent may employ others to perform, having first determined that such acts are necessary or proper to be performed. But not so with acts involving the exercise of a discretion, or anything of the character of a trust which is in its nature personal to an agent. In such cases the agent has no right to turn the principal over to another of whom he knows nothing. (2 Kent's Com., 633; *Com. Bank of Lake Erie* v. *Norton*, 1 Hill, 501.) The maxim is, *delegatus non potest delegare.* The authority to an agent from a principal to receive money is most clearly a personal trust and confidence which cannot be delegated without certain and plain authority. It does not help the plaintiffs' case that Virgil Whitney sometimes took money from the settlers or purchasers as their agent, to carry and pay to the defendants at Philadelphia. It is clear, therefore, that this money paid to Virgil, which never came to the defendants' hands nor to the hands of their authorized agent, was not in law a payment upon the bond and mortgage. The promise of Joshua Whitney that he would assume the payment to Virgil and allow it, does not estop the defendants from insisting that the payment was never made. Granting even that the plaintiffs' testator purchased in consequence of that promise, which does not appear, it would not so operate. He could not estop his principals from insisting upon what was true by any act or promise outside of his authority.

Interest at the rate of seven per cent was properly allowed. The lands were situated in Broome county in this State, and the securities were there executed. There is nothing to indicate that a rate of interest different from that allowed by the laws of this State was intended by the parties. In such a case the law of the place where the contract is made gov-

erns as to the rate of interest. (3 Kent's Com., 460, 3d ed.; Story's Conflict of Laws, § 296.) There is no question of any usurious intent in the case to affect the application of this general rule. It does not appear from the case where these securities were made payable. It is plain, however, that they were New York and not Pennsylvania contracts.

The only remaining question on the case is whether the letters of Eldredge to Miller of the 30th September, 1834, and of the 7th February, 1838, and the letter and statement of the amount due upon the bond and mortgage, of August 20th, 1834, to Eldredge and Collier, were admissible in evidence, against the plaintiffs' objections. Collier and Eldredge were the obligors and mortgagors, and were seized in fee of the premises. The plaintiff Lewis derived title immediately from them, and of course claimed under or through them, subject to this mortgage debt. The land in his hands was bound for whatever amount remained due and unpaid on the bond and mortgage. The question at issue, to be tried, was, whether the debt had been paid. The plaintiff affirmed that it had been; and the burden of proving the fact, rested upon him. These letters and statements were a part of the defendants' evidence to show that the payment claimed by the plaintiff to have been made had never been made. There was no question between the parties as to any thing, except this item of $326. Had these letters been offered as the mere declarations or statements of Eldredge, independently of his oral evidence, and as a substitute for it, they would, I am inclined to think, have been inadmissible as evidence, as being the declaration of a former owner of the land and the principal debtor, against a subsequent purchaser for value subject to the indebtedness. But they were not so offered or received. They were produced and identified by the witness Eldredge on his cross-examination. He had forgotten the facts therein stated, but was able to say in substance that the contents of the letters were undoubtedly true at the time they were written, although he was then unable to remember them. Under these circumstances it seems to me these papers were admissible as auxiliary to the testimony of Eldredge, and

as memorandums made by him, of a then existing state of facts, within the cases of *Halsey* v. *Sinsebaugh* (15 N. Y., 485); *Russel* v. *Hudson River R. R. Co.* (17 id., 136); *Gray* v. *Mead* (22 id., 462). But in any event it is difficult to see how the admission of these papers could have worked any possible injury to the plaintiff. There was no dispute that the amount claimed as a payment was paid to Virgil Whitney, and unless it was paid over by him to the defendants or their agents, it could not operate as a payment. Aside from that amount in the hands of Virgil Whitney there was no pretense that the debt had been paid. The plaintiff was able to show this money paid to Virgil, but nothing further. He did not, therefore, make out any case, even *prima facie*, and the defendants were clearly entitled to judgment, irrespective wholly of the evidence furnished by these letters. They do not affect the question of the authority of Virgil Whitney to receive the money for the defendants in any way, and clearly were not introduced or used for that purpose. I am of the opinion, therefore, that the judgment is right and should be affirmed.

Judgment affirmed.

ELIZABETH BURTON *v.* CECELIA BURTON *et al.*, Executors of William E. Burton, deceased.

The alien widow of a naturalized citizen of the United States, although she never resided within the United States during the lifetime of her husband, is entitled to dower in his real estate.

THIS action was brought in the New York Common Pleas by the plaintiff, to recover her dower in certain lands lying in the city of New York, of which her husband, William E. Burton, died siezed.

It is alleged in the complaint that the plaintiff, being a free white woman, was married to Burton in England, on the 10th April, 1823, and that such marriage has never been annulled. That Burton died in the city of New York on the 10th February, 1860, siezed and in possession of certain premises lying and being in said city, described in the complaint. That said Burton left a last will and testament which has been duly proved before the surrogate of said city, wherein and whereby he divised the said premises to the defendants, Cecelia Burton and John J. Cram, in fee, which persons he appointed exectuors of his said will. That the plaintiff has duly demanded her dower in the said premises, and that the same be admeasured to her; but the defendants deny her marriage to Burton, and refuse to set off her dower. Wherefore she demands judgment for her dower, and that the same may be set off to her, and also for $1,000 damages by reason of withholding the same.

The defendants, in their answer, by way of defense, allege, first, that plaintiff was never lawfully married to said Burton; second, that the plaintiff was born in Great Britain, and has ever since resided there, and until within the year preceding has not been in the United States during the lifetime of said Burton. That she was an alien and not a citizen of the United States; that said Burton was also born in Great Britain, and came to this country and was naturalized; at the time of the alleged marriage with the plaintiff, he was an

alien and resided within the kingdom of Great Britain. After such pretended marriage he came to Pennsylvania, where he was naturalized on the 8th October, 1840. Thereafter, and in 1848, he removed to the city of New York, where he resided until his death, and acquired the property described in the complaint, on the 4th October, 1851.

The plaintiff demurred to the second defense, because the matters therein stated do not constitute a counter claim or defense to the cause of action stated in the complaint.

The demurrer was argued before Judge DALY, and it was by him overruled and judgment thereon ordered for the defendants, with costs. The plaintiff appealed from the said judgment to the General Term of said court of Common Pleas, and that court affirmed the same, with costs. From that judgment the plaintiff appeals to this court.

The plaintiff claims to be a citizen of the United States by virtue of an act of congress passed in 1855, being chapter 71 of the laws of that year, entitled, "An act to secure the right of citizenship to children of citizens of the United States born out of the limits thereof." The second section of said chapter is in these words: "And be it further enacted, that any woman *who might lawfully be naturalized under existing laws*, married, or who shall be married to a citizen of the United States, shall be deemed and taken to be a citizen."

C. O'Conor, for the appellant.

H. A. Cram, for the respondent.

MULLIN, J. An alien widow of a native born or naturalized citizen, was not entitled to dower in the lands of her husband at the common law. (Co. Litt., 31; 2 Bl. Com., 131; 4 Kent's Com., 36). This general rule has been somewhat modified in this State. By section 1, of chapter 49, of the laws of 1802, it was provided that all purchases of lands made or to be made by any alien who has come to this State and becomes an inhabitant thereof shall be deemed valid to vest the estate to them granted, and it was declared

lawful for such alien to have and hold the same, to his heirs or assigns forever, and to dispose of the same, provided that any purchase thereafter made should not exceed one thousand acres. The Supreme Court held, in *Sutliff* v. *Forgay* (1 Cowen 89), that under this statute the widows of aliens entitled by the act of 1802, and the acts extending the same, to hold real estate, are dowable. The judgment in this case was affirmed by the Court for the Correction of Errors, in 5 Cowen, 713.

The Revised Statutes embody both the foregoing sections of the act of 1802, and the construction given thereto in section 2, of title 3, article 1, chapter 1, part 2, which section is in these words:

§ 2. The widow of any alien who at the time of his death shall be entitled by law to hold any real estate, if she be an inhabitant of this State at the time of such death, shall be entitled to dower of such estate in the same manner as if such alien had been a native citizen.

It was declared by section 2 of chapter 115, of the Laws of 1845, that the wife of any alien, resident of this State, who had theretofore taken by conveyance, etc., any real estate, and who had died before the passage of said statute, and the wife of any alien resident of this State, who might thereafter take by conveyance, etc., any real estate should be entitled to dower therein, whether she was an alien or a citizen, but dower could not be claimed on lands conveyed by the husband before the passage of said act. By the third section of the same chapter it was provided, that *any woman being an alien who had theretofore married* or might thereafter marry a citizen of the United States, shall be entitled to dower on the real estate of her husband within this State, as if she was a citizen of the United States.

These are the only exceptions to the general rule, that an alien widow is not entitled to dower and none of them aid the plaintiff, unless the section last cited may be held to extend to her. The plaintiff rests her claim to a dower interest in the premises in question, on the ground that she is by virtue of the act of Congress above cited, a citizen of the

United States, and it is necessary to meet and dispose of that question in the first instance.

Is the plaintiff a citizen of the United States? To bring an alien woman within the provisions of that act, she must be first capable of being naturalized, and second, married to a citizen of the United States.

To be capable of naturalization under the laws of the United States in force at the time the testator acquires the lands in question, and at the time of his death, the applicant must be: First, a free white person. Second, she must have resided five years within the United States. Third, she must be of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same. Fourth, she must renounce all titles or orders of nobility, if any she has.

It is not alleged that the plaintiff does not possess all these qualifications, except one, and that is, she has not been a resident of the United States five years, nor for any length of time prior to the death of her husband. At the death of the husband, when her right of dower became vested, if any right ever vested in her, she was not a resident of the United States, and could not at that time or at any time prior thereto have been lawfully naturalized. If a residence of five years was not a condition precedent to citizenship, residence for some length of time was most obviously contemplated. Without residence she could not be naturalized, and it is the most essential of all the requirements for naturalization, and cannot be dispensed with, unless the intention to dispense with it is most clearly manifested by the legislature.

It cannot require argument to show how vitally essential residence is to entitle a person to become a citizen of a country to which he does not owe a natural allegiance. The legislature or other body clothed with the power of conferring the right of citizenship may dispense with it; but it requires the clearest manifestation of such an intention before it can be admitted. The permanency and prosperity of a country depend in a great degree upon the attachment of its citizens. To clothe aliens with the high prerogative of citi-

zens, who have never resided within it, who know nothing of its institutions, who have never felt any of the responsibilities which a permanent resident of a country must feel, would be an act of madness or folly of which sane men could not be guilty. A law which would thus break down all the barriers which in all ages and all countries, barbarous and civilized, have been thrown around the acquisition of the right of citizenship, would in a few years utterly destroy the government. Its institutions would be at the mercy of foreigners, whose capacity for mischief would only be limited by the extent of the interests which they might have at stake. No country can afford to throw open the right of citizenship to all who may desire to enjoy it, without imposing on them the duty of residing within it. The more carefully it is guarded, and the more difficult it is to obtain it, the more highly will it be prized; and while it is confined to those only who come within its jurisdiction, it will have some security against disorder and revolution.

It is true that citizenship is conferred by acts of congress on classes of persons who may never have been within the United States, and as to whom it is not made a condition that they shall ever become residents; but those provisions do not manifest an intention to dispense with residence in any other cases, and particularly they do not manifest such an intention in the face of a provision which makes residence indispensable. The applicant must be capable of being lawfully naturalized. This he or she cannot be while a resident and citizen of another country.

It is insisted by the plaintiff's counsel that if residence is essential to entitle an alien woman to be deemed a citizen, the residence of her husband should be deemed her residence; and as in this case Burton was a resident at the time of his death, the condition is fulfilled. It is quite obvious that if the plaintiff, on her arrival in this country, had applied to a court of competent jurisdiction to be naturalized, that the residence of her husband here for five years before his death would not have been received as a compliance with the act of congress. The applicant must himself have

resided in the country for the required term, and it cannot be satisfied by a residence for the term of any other person. If the residence of the husband can satisfy the statute, I can perceive no reason why the naturalization of the husband should not, and, indeed, why it does not *ipso facto* naturalize the wife, or why the marriage of an alien woman to a native-born citizen should not clothe her with the rights of citizenship. But it is well settled that an alien wife is not made a citizen by either. (*Sutliff* v. *Forgay*, *supra.*)

It was held in *Wick* v. *Wick* (10 Wend., 379), that the widow of a natural born citizen could not be endowed by reason of her alienism. The Court for the Correction of Errors went much further, and held, in *Priest* v. *Cummings* (20 Wend., 338), that even the naturalization of the widow after the death of her husband did not relate back so as to entitle her to dower in the lands of her husband, of which he was seized at the time of his death. (See also *Conolly et al.* v. *Smith*, 21 Wend. 59.)

In *Kelly* v. *Harrison* (2 Johns. Cases, 29), it was attempted to sustain the alien widow's claim of dower upon the presumption or intendment that the residence of the husband was that of the wife, but it was not sanctioned by the court. In that case it appeared that both Kelly and his wife were born in Ireland, where they were married in 1750. In 1760 K. came to New York, and resided there during the revolution and until his death, in the autumn of 1798. The widow continued to reside in Ireland even down to the bringing of the action. It was held that as they were both British subjects, she was entitled to dower in all lands owned by him prior to the Declaration of Independence, but not as to any lands acquired by him subsequent thereto. By remaining in Ireland after the separation of the colonies from the mother country she became an alien, and therefore not dowable of lands acquired while her alienage existed. RADCLIFF, J., speaking of the intendment that the residence of the husband is that of the wife, says: If the case had been *silent* as to her continued residence abroad it might have been presumed that her condition followed that of her husband; but she is

expressly stated to be a British subject. * * * She had it in her power to pursue the condition of her husband and entitle herself to the like claim (claim for dower) in his sub sequent estate. Not having done this she must be deemed to have continued a British subject, and ought from that period be *restricted* to her rights as such. STORY, J., in *Shanks* v. *Dupont* (3 Peters, 248), speaking of the effect of coverture upon the national character of a woman, a native of South Carolina, who, during the revolution, married a British officer and returned with him to and thereafter resided in England, says: "The incapacities of *femes covert* provided by the common law apply to the civil rights and are for their protection and interest. But they do not reach their political rights nor prevent their acquiring or losing a national character. Those political rights do not stand upon the mere doctrines of municipal law, applicable to ordinary transactions, but stand upon the more general principles of the law of nations."

If the plaintiff could be brought within the act of congress referred to, by being capable of being naturalized, I should be of the opinion that her marriage to Burton while he was an alien would not exclude her from the benefits of the statute. This was an enabling statute, and is to be liberally construed, so as to give effect to the intention of congress. At the death of her husband, she was, in the language of the act, married to a citizen of the United States. There would not seem to be any sufficient reason for holding that congress intended to extend the right of citizenship to women whose husbands at the time of the marriage were citizens, and to exclude those who married husbands aliens at the time of the marriage, but who thereafter became naturalized. It seems to me, therefore, that it is not necessary in order to give to the plaintiff the benefits of the act in question, that Burton should have been a citizen at the time of her marriage to him. But as she was not at any time during the husband's life a resident of the United States, I am of the opinion she did not become entitled to be naturalized, and consequently

is not a citizen, and not being a citizen cannot be endowed of the lands in question as such.

The right to dower is not, however, given or withheld by act of congress, except so far as the right to it may be made by State laws to depend on the treaty or law-making powers vested by the Constitution of the United States in the Federal government. The act of Congress to which reference has been made does not, of itself, give to or withhold dower from alien widows, but as by the law of this State an alien widow cannot be endowed and a citizen widow can, the act of Congress, by making her a citizen, gives her a status in which the State law clothes her with the right which without the act of congress she would not be entitled to enjoy.

As the right to dower depends upon the State law, and as it is competent for the State to give the right to alien as well as native born or naturalized widows, we must go to the State statutes to ascertain whether the plaintiff, although an alien, is not entitled to dower.

I have already referred to the only provision which can be said to reach the plaintiff, and as it is very brief, I will again transcribe it. It is section 3 of chapter 115, of the Laws of 1845, and is in these words, viz.: "Any woman being an alien who has heretofore married, or who may hereafter marry a citizen of the United States, shall be entitled to dower in the real estate of her husband within this State, as if she were a citizen of the United States."

The plaintiff at the time of the passage of the act was an alien, and had theretofore married a man who then (the passage of the act) was a citizen of the United States. If this is the fair, reasonable construction of the section, the plaintiff by virtue of it is entitled to dower, she comes within the very letter as well as within the spirit of it.

Two reasons are urged why the plaintiff cannot take under the provision referred to. First, because her husband was not a citizen at the time of the marriage; and, second, because she was not at any time during the life of her husband a resident of this State.

1. Then was it necessary in order to entitle her to dower under this section, that her husband, at the time of their marriage, should have been a citizen of the United States?

It will be seen that the phraseology of the section of the State statute and of the second section, act of congress of 1855, are in this respect identical. The construction given to the act of congress applies to the act of 1845. Both are to be liberally construed. Marriage to a person who was a citizen at the time of the passage of the act, whether citizen at the time of the marriage or not, satisfies both their language and spirit. It was the alien wives of citizens who were intended to be benefited by the statutes, and as no reason can be presumed why those only should be made citizens by the one, or endowed by the other, who had married husbands who were citizens at the time of the marriage, rather than those who should marry husbands, aliens at the marriage, but who thereafter became naturalized; and as the evident intention was to remove a disability from alien women whose husbands were citizens, the construction should be such as to give full effect to the beneficent intention of the legislature. There is nothing in the mere act of marrying a citizen that should entitle the wife to a favor which the woman who marries an alien, afterward naturalized, would not seem to be equally entitled. The fact that the husband of an alien is a citizen, "attached (as he must be) to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same," furnishes some security that the wife will not be hostile to its interest, or dangerous to its peace.

This security is none the greater by reason of the husband being a citizen at the instant of marriage rather than made such the next day, or month, or year. It must be conceded that it was competent for the legislature to restrict the right of dower to such women as should marry husbands who were citizens at the time of the marriage. But as we are to arrive at the intention of the law makers from the language of the statute, construed in reference to the evil to be remedied, or the good to be attained, and as the language of the act is

satisfied, and the end proposed best attained by the construction which I have felt constrained to give the statute, I am of the opinion that under it the plaintiff is entitled to dower.

The liberal construction given by the Supreme Court to the act of 1802 in *Sutliff* v. *Forgay* (*supra*), whereby it held that the purchase by a husband, of land in 1804, he having been naturalized in 1803, inured to the benefit of the alien wife, and entitled her to dower in the lands so purchased, should be applied to the statute of 1845. The act of 1802 under which that decision was made declared "that all purchases of land, made or to be made, by any alien who has come to this State and become an inhabitant thereof, shall be deemed valid, to vest the estate to him granted, that he might dispose of and hold the same to his heirs and assigns." By an act passed in 1808 all persons authorized by the act of 1802 to acquire real estate might also take and acquire by devise and descent. It will be seen that there is no allusion to rights of dower in either statute, yet the Supreme Court held that as the wife by the act of 1802 was capable of acquiring the title to hold the purchase of the husband inured to her benefit, so that at the time of his purchase she acquired an inchoate right of dower in the lands so purchased by him. The same court in the subsequent case of *Priest* v. *Cummings* (16 Wend., 617), and the Court for the Correction of Errors in the same case (20 Wend., 338) express doubts whether the decision in the first case was put on the true ground, yet they do not question the correctness of it, but on the contrary approve the liberal construction which the court gave to the statute whereby the widow was held entitled to dower.

2. Was residence in this State essential in order to entitle the plaintiff to dower?

The act does not in terms require it, and I do not think the legislature intended to require it. The absence of any such intention is demonstrated, it seems to me, by the other provisions of the act. The first section declares that any alien *resident* of this State who had taken a conveyance of real estate in this State, before filing in the office of the Secretary of State the deposition specified in section 15, title

1, chapter 1, of the second part of the Revised Statutes, might on filing such deposition, hold such real estate in the same manner and with the like effect as if he was a citizen of the United States. By the second section of the same act, it is provided that the wife of any alien resident of this State who had therefore taken, by conveyance, any real estate, and who had died before the passing of said act, and the wife of any alien resident who might thereafter take by conveyance, etc., should be entitled to dower therein, whether she be an alien or citizen.

By the fourth section, if any alien resident who had purchased, or who should thereafter purchase real estate and died, or should thereafter die, leaving persons who would answer the description of heirs of such persons, whether citizens or aliens, were declared capable of taking and holding as his heirs; but if any of such persons were males of full age, they should not hold such real estate unless they are citizens, or have filed the deposition required to be filed, in order to entitle them, if aliens, to take and hold real estate.

The fifth section provides that the devisee or grantee of any alien resident, may take and hold, whether a citizen or alien, but if such grantee or devisee was an alien and a male of full age, he must make and file the deposition required to be filed before he should be enabled to take and hold the premises granted or devised.

By the sixth section a resident alien was authorized to grant or devise real estate to a resident alien, if such grantee, etc., had failed, the deposition required by law, on condition that the resident male alien of full age should himself file a deposition. It is unnecessary to refer to all the provisions of the statute. Suffice it to say, that in eight out of the first nine sections, where residence by the grantee or devisee is considered essential by the legislature, as a condition precedent to the right to take and hold land, it is so declared. But the third section, and in the subsequent sections, where females are permitted to take either as grantees or devisees, or as dowagers, residence is not made a condition, it being made necessary only as to males of full age. By making

residence a condition as to one class of persons, and omitting to require it as to another class, conclusive evidence is furnished that the legislature did not intend to require it of such other.

It is urged by the defendants' counsel that to give the widow dower in the lands of her husband would be a violation of the Constitution of the United States, which declares that no person shall be deprived of life, liberty, or property without due process of law. I do not perceive that the difficulty suggested by the counsel can arise. If I am right in holding that the widow takes not under the act of congress, but under the State law of 1845, then the right to dower attached the instant the husband purchased the land, precisely as it would have done had she been at that time a citizen of the United States. Unless, therefore, all laws giving dower to alien widows in the lands of husbands are unconstitutional, there is no reason for holding the act of 1845 to be so.

I am of opinion that the judgment of the Common Pleas should be reversed, and judgment ordered for the plaintiff, overruling the demurrer, with costs.

INGRAHAM, J. 1st The plaintiff was not a citizen when she was married.

2d. The defendant was not a citizen when he came to this country.

3d. The plaintiff never came to this country during the life of the wife.

4th. The plaintiff could not have been naturalized when the husband was.

5th. At no time during the life of the husband could the plaintiff have been made a citizen.

6th. The act of 1845 does not confer any rights of citizenship on the plaintiff.

7th. The act of 1855 does not apply to her because she could not have been made a citizen at any time during the life of the husband.

8th. The right of the husband to property purchased before the wife became a citizen, cannot be impaired by any subsequent legislation of Congress.

9th. Any such act does not act retrospectively in the words "can be construed by prospective action."

Judgment should be affirmed.

WRIGHT, J. The action was for the admeasurement of dower on lands whereof the defendants' testator died seized. There was a demurrer to the second defense set up in the answer; and assuming the truth of the allegations of the complaint which are not put in issue by the second defense, and also assuming the truth of the allegations of the second defense, the case is this: William E. Burton, the decedent, and the plaintiff, were both natives of England, and by birth British subjects. They were married on the 10th April, 1823, in England, where they both then resided. Burton became thereafter a resident of Pennsylvania, and became a citizen of the United States by naturalization on the 8th October, 1840. He removed to this State in 1848, and thenceforth resided therein until the 10th February, 1860, the day of his death. He acquired the property in question on the 4th October 1851. The plaintiff is a free white woman. She always resided in England until a year prior to the action, and never was in the United States during Burton's lifetime.

The only question is, is the plaintiff entitled to dower in the lands mentioned in the pleadings? At common law an alien woman was not entitled to be endowed of the land of her husband, whether he was a citizen or not. (Jenk. Cent., p. 3, case 2; 4 Kent Com., 36; *Kelly* v. *Harrison*, 2 Johns. Cases, 29.) But the rule has been somewhat changed in this State by statute. (Laws of 1845, chap. 115, §§ 2, 3.) The change wrought, however, I think will not embrace the case of the plaintiff if she be an alien. The statute provides that "any woman, being an alien, who has heretofore married, or who may hereafter marry a citizen of the United States shall be entitled to dower on the real estate of her

husband, within this State, as if she was a citizen of the United States." (§ 3.) The woman must before or after the passage of the act in 1845, have married a citizen of the United States. At the time of the plaintiff's marriage to Burton, in 1823, he was an alien. The evident intention was to provide for cases of citizens who had married alien wives either before or after the passage of the law; and whether the case of the widow of an alien naturalized after their marriage, was omitted by accident or design, it is not within the provisions of the statute. Until the legislature interfere, such case must be governed by the common law. (*Greer* v. *Sankston*, 26 How. Pr., 473.)

But was the plaintiff an alien or a citizen? If the latter, she had a right to be endowed of the estate of which her husband was seized during the coverture, except so much thereof as he had aliened previously to her personal disability to take dower by reason of her alienism, being removed. It is claimed that the act of Congress passed February 10th, 1855 (10 Stat. at Large, chap. 71), made her a citizen from and after its passage; and I confess that I am of the opinion that such is its true construction. There seems no room for a different interpretation. That part of the act affecting the case, and which is in a distinct section, is in these words: "Any woman that might lawfully be naturalized under the existing laws, married, or who shall be married to a citizen of the United States, shall be deemed and taken to be a citizen." (§ 2.) The provision is nearly a transcript of the 16th section of the act of 7 and 8 Victoria, chap. 66, 1844, which declared "that any woman married, or who shall be married, to a natural born subject or person naturalized, shall be deemed and taken to be herself naturalized, and have all the rights and privileges of a natural born subject." Both statutes describe a condition or *status* of the "woman" existing at the moment they were passed. The words refer merely to the marriage condition. In *Regina* v. *Manning* (2 Carr. and Kir., 886), in speaking of the British act, POLLOCK, Ch. B. said: "The expression of the statute is 'any woman married,' that is 'already married,' and in that

case a Swiss woman who married an Englishman was denied her jury *de mediatate linguæ* on the ground that this was the privilege of an alien, and the prisoner having by the act been made a British subject, with all the incidents that attached to that status, she was not entitled to it." The act of congress declares that "any woman married (that is, married at the passage of the act) to a citizen of the United States, shall be deemed and taken to be a citizen." The effect of the act was to grant the privileges of citizenship to women married to citizens of the United States without regard to the fact whether the ceremony of marriage had preceded the ceremony of naturalization in cases where the husband was a naturalized citizen, provided the woman herself "might lawfully be naturalized under the then existing laws." The existing naturalization act required no more than that the person claiming its benefits should be a "free white person" and not an alien enemy. (Act of April 14, 1802, 2 Stat. at Large, 153). Such a person "might lawfully be naturalized." The court below held that the intent and object of the act of 1855 was to grant the privilege of citizenship to an alien woman resident or not married to a person who, at the time of the marriage, was a citizen of the United States, or at farthest to an alien woman residing in the United States, though married to an alien abroad and who came here with him, or followed him here, and in one or the other of these ways identified herself with the country of his adoption. This conclusion was reached, not from looking at the act itself, but by traveling out of it. The court, after learnedly considering previous incomplete legislation of congress on the subject of the citizenship of children of American citizens born in a foreign country, jump at the conclusion that the legislative intent was to make citizens of those alien wives whose husbands were citizens at the time of the marriage, and not at the time of the passage of the act, or at most those wives of persons becoming citizens by naturalization, and who resided within the United States. But, manifestly, where the legislature declares, in clear, precise and unambiguous terms that "a woman married to a citizen of the United

States (whether native born or naturalized) shall be deemed and taken to be a citizen," courts have no right by judicial construction to overrule the plain and explicit expression of the legislative will. In *Regina* v. *Manning* (*supra*), when the case was in the Exchequer Chamber it was distinctly held that those naturalization acts are to be construed literally when they are plainly expressed, and are not to be restrained by exceptions inferred or implied by the judges. It is not for courts to say that a distinct subsequent enactment of this character is unwise or impolitic, and under color of interpreting the legislative will substitute something that they deem wiser than what is written in the statute book. But if this were properly to be tolerated, for myself I could conceive of no ground for excluding from the benefit of the act of 1855, the women, who at the passage of the act were the wives of naturalized citizens, merely because the ceremony of marriage had preceded the ceremony of naturalization.

By the correct interpretation of the act of 1855, then, I think the plaintiff falls within that class of persons to whom the act granted the privileges of citizenship. It is true that from some cause she never actually resided in this country. But the act does not require that the woman claiming its benefits shall have resided within the United States, and, if it did, the residence of the plaintiff, was, by construction of law, the same as that of her husband. (Story's Conflict of Laws, § 46; *Warrender* v. *Warrender*, 9 Bligh., 103, 104.) It is said, furthermore, that she did not, by residence, or in any other way, assume the allegiance of the United States, or give her assent to the citizenship conferred by the act. This, however, was not necessary to entitle her to claim its benefits. The privileges of citizenship have often been granted to whole classes of persons, without requiring any act of assent on their part, or subjecting them to the duties of allegiance, or exposing them to the penal consequences of treason in case they should commit acts of hostility against the government making the grant. The act of 7 and 8 Victoria, before alluded to, is a notable example. (1 Chitty's Black-

stone, 366, note 1; *Ludlum* v. *Ludlum*, 26 N. Y., 376–378; *Fitch* v. *Weiler*, 6 Harr., 63, 64.)

The point was raised and pressed with much earnestness by the defendants' counsel, that the plaintiff was not entitled to claim dower on the land described in the complaint, it having been purchased by Burton in 1851, and an absolute unincumbered title having been vested in him prior to the passage of the act making his wife a citizen. The objection in substance is, that a naturalized wife is not entitled to claim dower in lands of her husband, acquired previously to her naturalization. The ground of the objection is a want of power in congress to pass any law, the effect of which is to take away or impair vested rights of property in the husband. Burton, it is said, was the absolute owner of the land in question before his wife was naturalized, and an act of congress by which property is taken from one and transferred to another, or by which the property of one is taken or destroyed without compensation, even though it is not transferred to another, is within the condemnation of that provision of the federal Constitution, which declares that "no person shall be deprived of life, liberty or property, without due process of law" (amendments to U. S. Const., Art. 5), and that to create a contingent right of dower, and attach it to land of which he is the absolute owner, so as to diminish its vendible value and limit his power of disposition in respect to it, is a taking of his property in a constitutional sense. The difficulty with this argument is, that the act of congress naturalizing the wife, of itself gives nothing to the wife or takes anything from the husband in the nature of property; it merely removes a personal disability of the wife to take dower by reason of her alienism; and in this Burton had no vested right. A right in the wife to take dower was, at all times, a fundamental feature in the law and civilization of the people amongst whom he and the plaintiff were born and married.

He did not depart from the sovereignty of that civilization when he removed to this country and became an inhabitant thereof. (1 Greenl. Cruise, title 6, chap. 1, §§ 1, 2, 3, 4,

5, 6; Park on Dower, p. 2 and notes.) Personal disabilities are imposed or removed by the State as a matter of State policy; and no third person has either a legal interest or a right of the nature of property in their existence or continuance. The effect of their absence or presence on the individual interests of third persons is merely incidental. The creation or preservation of such interests is never an object or a duty of the legislature in dealing with such disabilities. It is purely a matter of public policy. A married woman may obtain naturalization without the consent of her husband (*Priest* v. *Cumming*, 16 Wend., 626; S. C. on Error, 20 id., 345); and in virtue of her naturalization she at once becomes entitled by act and operation of law to dower on all lands theretofore acquired by him, and of which he was seized during the coverture, except such as he had previously aliened. In other words, as against the husband, the act of naturalization perfects her right in respect to his previously acquired lands. "When an alien woman," says CRUISE, "is created a *denizen*, she becomes entitled to dower out of all the lands whereof her husband was seized at the time when she was created a denizen; but not out of any lands whereof he was seized before, and which he had aliened." (1 Greenl. Cruise, title 6, chap 1, § 30.) So if she were naturalized. (*Priest* v. *Cummings*, 16 Wend., 617.)

The judgment of the Common Pleas should be reversed, and judgment given for the plaintiff on the demurrer to the second defense, with directions that the court below proceed to try the question of fact presented by the first defense.

All concur with WRIGHT except DAVIS and HOGEBOOM.

Judgment reversed.

WALTER S. BOND, Appellant, v. JAMES S. WILLETT, Administrator, etc., Respondent.

To make a valid levy upon goods, it is necessary that the property should be in view and under control of the officer; that he should assert such control either by removing the property, or asserting the levy, and that some memorandum of the levy should be made at the time.

The leaving of the goods in the possession of the debtor, although at the risk of the officer, does not invalidate the levy.

THE plaintiff appeals from a judgment in favor of the defendant, who was sheriff of the city and county of New York. The action was to recover seventeen pieces of silk levied on by the sheriff under an execution, in favor of F. A. Conkling against Remsen & Dingee, who were partners and were in possession of a stock of goods, of which the silks were a portion, in their store on Sixth avenue, in New York. Remsen & Dingee failed in business, and were largely indebted to Bliss, Briggs and Douglass. They sold to Bliss, Briggs and Douglass their whole stock of goods for a gross sum agreed on between them. The sale took place on the 12th September, 1856. About the middle of September the plaintiff bought the stock of goods from Bliss, Briggs and Douglass. The store was then closed, and the plaintiff had heard of the failure of Remsen & Dingee.

Previous to the sale by Remsen & Dingee of their stock, a judgment was recovered against them in favor of Conkling and others on 27th August, 1856, and an execution was issued thereon on the same day to the sheriff of New York. On the same day the deputy went with it to the store of Remsen & Dingee. He saw Mr. Dingee and told him he had an execution against the concern. Dingee asked who issued it; the deputy showed it to him. Dingee said it was premature. Deputy told him he must levy on the property. Dingee said he would like to see his counsel, and named Mr. C. B. Smith. The deputy said he had no objection to his seeing his counsel before he removed the property. He then told him he

must make his levy, and took up one of the bill-heads of Remson & Dingee and on it made memorandum of levy. This memorandum was produced in court, and among other things contained fifty pieces of silk (black and colored). He, at the same time, made an indorsement on the execution, 27th August, 1856, levied on stock of dry-goods in store 204 and 206 Sixth avenue.

On the next day an order was served on the sheriff staying all proceedings.

On the 20th September, 1856, the sheriff went to the store and found persons who said they were acting for plaintiff measuring the goods.

Bond claimed to own the goods. The deputy sheriff and Bond agreed that the sheriff should abandon his levy on all the goods but the black silks, and Bond agreed to buy them in for $2,000. Bond told deputy the silks were a part of the stock of Remsen & Dingee. He set them apart and then replaced them.

Defendant's counsel on the trial claimed that as there had been an actual levy proved, the plaintiff must show he had no notice of the execution.

The plaintiff denied that there had been any levy proved, or if there was that it had been abandoned. The plaintiff claimed to submit the questions of abandonment and notice to the jury, which was refused by the court, and the jury were instructed to find a verdict for the defendant.

The jury found for the defendant, and the exceptions were directed to be heard at the General Term, where judgment was ordered on the verdict for the defendant, and the plaintiff appealed to this court.

John H. Reynolds, for the appellant.

A. S. Vanderpoel, for the respondent.

INGRAHAM, J. The principle question in this case is, whether there was a valid levy on the silks in controversy. If there was and it was not abandoned by the sheriff afterward, the plaintiff could not recover.

That there was a sufficient levy as against the debtors in the execution there can be no doubt. This was so held in *Roth* v. *Wells*, in this court, decided at June Term, 1864. In that case the sheriff went to the store of the defendant in the execution, saw the goods there. The sheriff showed the execution to the debtor, who told him he need not levy but would pay in a few days. Sheriff told him he could hold his levy, but would give him time to pay. This was all that was done, and SELDEN, J., says: "The goods being present and within the power of the sheriff, these circumstances constituted such an exercise of dominion over them as amounts to a levy at least as against the defendants in the execution." (23 Wend., 490; 4 Kern., 70.)

I consider that case so conclusive as to the sufficiency of the levy so far as relates to the debtor, that it is unnecessary to examine any other authorities on that point. (5 Denio, 619.) The question then is what additional facts are necessary to make out a levy that will bind the property in the hands of purchasers. The statute only protects purchasers in good faith, between the delivery of the execution to the sheriff and the actual levy. (2 R. S., 366, §. 17.) "The title of a purchaser in good faith of any goods acquired prior to the actual levy of an execution, without notice of any such execution being issued, shall not be divested by the fact that such execution had been delivered to an officer to be executed before such purchase was made." If the levy has been actually made before the purchase it is as effectual against the purchaser as it is against the debtor.

In *Ray* v. *Harcourt* (19 Wend., 495), NELSON, Ch. J., says: "What constitutes a levy according to the practice in this State has been well settled and is not now open to dispute. The officer must take actual possession, and for this purpose goods should be within his view and subject to his disposition and control. It is not necessary that he should remove them or leave an assistant in possession. They may be left with the defendant at the risk of the plaintiff or of the officer, or security for delivery at a future day may be taken." This case was approved in *Van Wyck* v. *Pine* (2

Hill, 666), where it is said: "To constitute a valid levy the goods should be within the view of the officer and subject to his control." (See also *Westervelt* v. *Pinckney*, 14 Wend., 123.) In *Connah* v. *Hale* (23 Wend., 462), it was held that seeing the goods in boxes, making a memorandum of them on the execution, and declaring that he had seized them, was sufficient to authorize the owner to maintain trespass, although the goods were in no way taken away or interfered with." In *Camp* v. *Chamberlin* (5 Denio, 198 , BEARDSLEY, Ch. J., says: "In order to constitute a valid levy as to third persons the goods must not only be within view of the officer, but must be subjected to his control. He must take actual possession, which, although the goods are present can only be done by manual acts, or by an oral assertion that a levy is intended, and which is acquiesced in by those who are present and interested in the question. There must be possessory acts to indicate a levy or it must be asserted by word of mouth, so that what is thus done by the officer if not justified by the process will make him a trespasser." In *Green* v. *Burke* (23 Wend., 490), COWEN, J., says: "An actual taking of the goods does not necessarily imply an actual touching of the goods, but merely such a course of action as is calculated to reduce them to the dominion of the law. And in *Barker* v. *Binninger* (4 Kern., 270), JOHNSON, J., held that a manual interference with the property was not necessary to the validity of the levy. He says: "An assertion of right by an officer in virtue of process in his possession in respect to goods within his power is an actual taking possession of them."

From this examination of the cases there can be no difficulty in ascertaining what constitutes a valid levy either against the debtor or against any persons claiming title through him to the property:

First, the property must be in the view and under the control of the officer.

Second, the officer must take possession of the property either by removing or by an oral declaration that a levy is

intended, and that the officer claims to hold the goods under such levy.

Third, an inventory, or, at least, a memorandum of the levy should be made at the time.

Fourth, leaving the goods in the possession of the debtor until the sale, is at the risk of the officer, but does not invalidate the levy.

The facts proven in this case, in my judgment, show a sufficient levy on the part of the sheriff to hold the property even against a subsequent *bona fide* purchaser. He went into the store where the property was, looked at it sufficiently to ascertain the character of the goods before him, informed the debtor that he had an execution against him, and when the debtor remonstrated as to the regularity of the execution, he insisted on the necessity of his making a levy. When the debtor still asked for time to see his counsel, the officer was willing to give him time to see his counsel, but still insisted on the performance of his duty in making the levy; and in his presence took up a piece of paper and made an inventory of the articles levied on, which he placed within the execution, and indorsed upon the process the fact of having levied that day on the stock of goods.

I am at a loss to see what other acts the sheriff could have done to make the levy more valid except to remove the goods from the debtor's possession. Had such removal taken place, then no doubt would have been expressed as to the validity of the levy. So long ago as the case of *Butler* v. *Maynard* (11 Wend., 548), it has been held that leaving the property in possession of the debtor for a reasonable time, and without an improper motive, after the levy, was not fraudulent, but the rights of the plaintiff and officer remained in full vigor. It is not necessary that the officer should measure or weigh the goods, or ascertain the exact quantity of each before the levy is complete. That he can do afterward, if necessary, before the sale.

It is urged by the appellant's counsel that there is no evidence that the silks in controversy were in sight at the time of the levy. There is no proof that they were not. The in-

ventory made contains fifty pieces of silk (black and colored); and in the absence of any evidence to the contrary the presumption is, that they were before him. If the plaintiff intended to rely on this ground he should have shown that the silks in question were not in the store when the levy was made.

There is, however, another fact in this case which should estop the plaintiff from denying that these goods were a part of those levied on at that time by the officer. In order to enable the plaintiff to dispose of the stock of goods he agreed with the officer, if he would abandon the levy on the residue of the goods, he would lay out these silks as the silks to be taken under the execution. He said they were sufficient for that purpose, tied them up himself, and agreed to bid for them if sold, enough to satisfy the execution. After having obtained a release of all the other property covered by the levy, it is too late for the plaintiff to urge that the silks he persuaded the officer to hold under his levy were not a part of the goods originally seized by him.

The case depended entirely upon the validity of the levy, and on this point there was but one witness, and his statement was uncontradicted. It became a question of law whether the levy was sufficient, and there was no question of fact to go to the jury. The court properly instructed the jury to find for the defendant.

The judgment should be affirmed with costs.

DAVIES, J. This action is in the nature of replevin, brought by the plaintiff, to recover certain goods taken by and in the possession of the defendant intestate, as sheriff of the city and county of New York. He claimed to hold the property by virtue of a levy thereon made on the 27th of August, 1856, under and by virtue of an execution issued out of the Supreme Court, in favor of Frederick A. Conkling, and others, against Remsen & Dingee. The defendants in the execution were copartners, under the name of Remsen & Dingee, merchants, and doing business and having their store at Nos. 204 and 206 Sixth avenue, in said city. It was proved by

the deputy-sheriff, the only witness examined on the trial as to the levy, that immediately upon the receipt of the execution, he proceeded to Remsen & Dingee's store, and announced his business to the debtor Dingee, told him he had an execution against the firm, showed him the execution and told him, notwithstanding Dingee's objection, that the judgment had been prematurely perfected, that he "must act under this writ, and must levy on the property." Dingee wished to see his lawyer, the witness told him he must make his levy, and he took up one of the bill-heads of the firm and on it made a memorandum of levy. He testified, "I also made an indorsement on the execution in these words: 27th August, 1856, levied on stock of dry goods in store 204 and 206 Sixth avenue."

By an arrangement made between the officer and Dingee, the officer agreed to leave the goods levied on in the store, and the next day an order staying proceedings on the execution was served on the sheriff, and which was not discharged until the 19th or 20th of September following, when the officer went to the store and took possession of the goods. The goods were then claimed by the plaintiff as having been purchased by him from the firm of Bliss, Briggs & Douglass, who, it was alleged, purchased the same from Remsen & Dingee, the defendants in the execution, on or about the 12th of September, 1856, and the goods claimed by the deputy sheriff to be levied on, were sold by Bliss, Briggs & Douglass, to the plaintiff Bond, on the 19th of September, 1856.

On the 20th of September 1856, after the order staying proceedings had been vacated, the deputy sheriff called at the store and found Bond, the plaintiff, there, who claimed the silks and who was then informed of the levy and the claim of the sheriff thereunder. The latter then took possession of the silks, and the plaintiff brought this action. On the trial, the defendant's counsel claimed, that, there being an actual levy proved, the plaintiff, before he could recover, must show that he had no notice of the execution. The plaintiff claimed that there had been no actual levy, and that even if there had been, it had been abandoned. The court decided as matter

of law, that there had been an actual levy. The plaintiff then claimed to go to the jury on the question of abandonment, and also on the question of notice of execution issued. Both of these claims were refused by the court, and the plaintiff's counsel excepted to each of said refusals, and the judge thereupon instructed the jury that there was nothing in the case for them to pass upon except the value of the property, and that under the evidence they must find a verdict for the defendant, assessing the value of the property. To which instructions of the judge and any point thereof, the plaintiff's counsel then and there excepted, and the jury found a verdict for the defendant assessing the value of the goods, and damages for their detention at $1,868.48, and six cents damages. And thereupon the judge directed that the hearing upon the said exceptions should be had in the first instance, at the General Term.

And the General Term, on the hearing of said exceptions, overruled the same, and rendered judgment upon said verdict for the defendant for the sum of $2,429.94, and the plaintiff thereupon appealed to this court. Pending this appeal the defendant died, and the suit has been revived, by making his administrator party defendant. At the common law no levy upon personal property was necessary, the goods were bound from the award or teste of the execution, and the sheriff could take the goods out of the hands of even a *bona fide* purchaser. (Anonymous, Cro. Eliz., 174; *Burcher* v. *Wisemand*, id., 440.)

As a judgment when entered during the term had relation back to the first day of the term, the execution could be tested as of the first day of the term, so it might well happen that the title of the sheriff was superior to that of a *bona fide* purchaser, even though he had become such purchaser before the entry of the judgment.

To remedy the evils which this relation of the writ occasioned, the Statute of Frauds (29, Car. 2d, ch. 3, § 16), enacted that no writ of *fieri facias*, or other execution, should bind the property or the goods of the debtor but from the time of the delivery of the writ to the sheriff, and the sheriff

was required to indorse upon the writ the time of its receipt by him.

This provision was early incorporated into the legislature of this State. The present provision of the Revised Statutes is, that whenever an execution shall be issued against the property of any person, his goods and chattels, situated within the jurisdiction of the officer to whom such execution shall be delivered, shall be bound only from the time of the delivery of the same to be executed. (2 R. S., 365, § 13.)

The goods and chattels of Remsen & Dingee, the defendants in the execution, were bound and subject to the same, on the 27th of August, 1856, and the lien of that execution, thus created, could only be defeated by the title of a purchaser in good faith, without notice of the execution. This court held, in the case of *Roth* v. *Wells*, decided at June Term, 1864, that the right of the sheriff to sell the goods of a judgment debtor within his bailiwick, at the time of the receipt of the execution by him, without any actual levy, remained perfect as against the judgment debtor, when no title of a *bona fide* purchase intervened, or was set up.

But it is also declared by the Revised Statutes, that the title of any purchaser in good faith, of any goods or chattels, acquired prior to the actual levy of any execution, without notice of such execution being issued, shall not be diverted by the fact that such execution had been delivered to an officer to be executed before such purchase was made. (2 R. S., 366, § 17.)

Assuming, therefore, as we may for the purpose of this discussion, that the plaintiff was a *bona fide* purchaser of the goods of Remsen & Dingee, and that such purchase was made without any notice of any execution having been issued, it becomes essential to ascertain whether any actual levy of the execution issued had been made prior to such purchase. The facts in reference to such levy were uncontradicted, and therefore there was nothing to submit to the jury on that point. It was purely a question of law upon the conceded facts, whether or not such levy had been actually made. The officer testified that he made the levy, with the

execution in his hands, which he then exhibited to one of the defendants in the store, with the goods claimed to be levied on in full view; that he then declared such levy made, and made a memorandum thereof and of the goods levied on, in the presence of one of the defendants in the execution, and folded the same in the execution, and upon the promise and engagement of said defendant to permit the goods to remain as they were, the officer left them in the store and in his charge. Did these acts and declarations amount to an actual levy upon the 27th of August, 1856? I cannot have a doubt but they did, and the authorities abundantly sustain this position. Crocker on Sheriffs, § 425, says: A levy upon personal property is the act of taking possession of, attaching or seizing it, by the sheriff or other officer, under and by virtue of any execution he may hold against such property, whereby the lien of such execution upon such property becomes perfect, and the property is thereupon deemed to be in the custody of the law. We have seen that such property is to be deemed in the custody of the law and subject to the execution from the moment it is delivered to the officer, where no title of a *bona fide* purchase, or a purchaser without notice of an execution having been issued, intervenes or is set up. The doctrine to be deduced from the cases is, that no actual or valid levy upon personal property, against a *bona fide* purchaser, or a purchaser without notice of the execution, can prevail and defeat their title; unless such property is present and subject to the disposition and control of the officer seeking to make the levy. (*Haggerty* v. *Wilber*, 16 Johns., 287; *Beekman* v. *Lansing*, 3 Wend., 446; *Butler* v. *Maynard*, 11 Wend., 548; *Ray* v. *Harcourt*, 19 Wend., 495; *Barber* v. *Binninger*, 4 Kern., 270.)

In *Haggerty* v. *Wilber*, Chief Justice SPENCER said, in reference to the necessity of making an inventory upon a levy which was insisted on as necessary to its validity, that it was not necessary in all cases, for that it had been held that a seizure of part of the goods in a house, by virtue of a writ of *fieri facias*, in the name of the whole, is a good

seizure of all. The inventory furnishes the means of ascertaining what goods were levied on. It may be safely laid down that the sheriff must have the goods under his view and within his power, to constitute a good levy; a proclamation of a levy of goods locked up and not within view of the sheriff, is no levy. In the case at bar, all the elements deemed essential to constitute an actual levy, are found. An inventory of the goods levied on, was made at the time, although this is said not to be essential. The goods were in full view of the officer, and they were within his power, as he could have removed them or placed a person in custody of them. In addition he proclaimed his levy and exhibited the process under which he made it.

In *Beekman* v. *Lansing*, MARCY, J., cites with approbation *Haggerty* v. *Wilber*, and says it is not necessary that an assistant of the officer should be left in possession of the goods, or that the goods should be removed, they may be left in the custody of the defendant at the risk of the plaintiff or of the sheriff. In *Butler* v. *Maynard*, Judge NELSON, in delivering the opinion of the court, observed that in view of the law as it stood before the Revised Statutes, and to determine the rights of all parties as far as the same can consistently be done, with those statutes, as well as to enable public officers to understand their duties, that the soundest construction to be given to them will be to hold that any levy which in law is valid as against the defendant in the execution and will justify a sale under it, will operate to defeat a subsequent purchase, though *bona fide* and for a valuable consideration. As we have already seen, the *mere delivery* of the writ to the sheriff heretofore had that affect, now there must be an actual levy, but the statute uses this term as known and understood in the case, and means such a levy as is required before the property can be sold.

In *Ray* v. *Harcourt*, NELSON, Ch. J., referring to these authorities says, what constitutes a levy according to the practice in this State, has been very well settled, and is not now open to dispute. The officer must take actual possession, and for this purpose the goods should be within his

view, and subject to his disposition and control. It is not necessary that he should remove them, or leave an assistant in possession, they may be left with the defendent. But this court has definitely settled what acts and declarations are sufficient to constitute an actual and valid levy. In *Barker* v. *Binninger*, the head note to that case is, a manual interference with chattels is not requisite to constitute a valid levy thereon. It is sufficient that the property is present, and subject to the control of the officer having the execution, and that he there openly states that he levies upon and asserts authority over it by virtue thereof. In that case the deputy sheriff went with the defendant in the execution, to a stable, where the horse claimed to be levied on was, that when they had gone into the stable, the horse being there within his view, he informed the defendant that he had the execution against him, and that he then levied on the horse by virtue of the execution, and that he must not move him, and that on his return to his office the next day, he made a formal memorandum of the levy.

It is entirely clear, therefore, that the levy in the present case, fully comes up to all the requirements of the laws, and was valid and effectual to subject the property levied on to the lien created thereby. The plaintiff, therefore, assuming that he was a *bona fide* purchaser of the goods, and without any notice of any execution having been issued, cannot set up his title, to defeat such lien. The court properly decided that an actual levy had been proven, and that the defendant was entitled to recover the property levied on. There was no pretense or proof to sustain the assumption that there had been an abandonment of the levy. The sheriff was stayed in his proceedings on the execution and the levy made thereunder, by an order of a judge of the Supreme Court, and as soon as that order was vacated, he resumed his control and dominion over the property levied on. If the jury had found that there had been an abandonment of the levy, it would not have been supported by any proof on the trial, and could not have been sustained. It was no error, therefore, in the judge, in refusing to submit that question to the jury. It

was wholly immaterial, if an actual levy was established, whether or not the plaintiff had notice of the issuing of the execution before he made his purchase.

If no levy had been made out then, the defendant, successfully to defeat the purchase of the plaintiff, must either have shown that the purchase was not *bona fide*, or that it was made with notice of the issuing of the execution. In this respect only did the inquiry become at all material, whether or not the plaintiff had notice of the execution. The plaintiff, therefore, an actual levy having been proven, would not have been at all benefited by the finding of the jury, that he made his purchase, without notice of the issuing of an execution. The judge, therefore, properly declined to submit that question to the jury. The judgment appealed from should be affirmed.

All concurring,

Judgment affirmed.

HENRY M. BARNES, Respondent, v. THOMAS N. ALLEN, Appellant.

The wife is an individual having separate rights which the law will uphold and protect against her husband — among which is the right to invoke and receive aid, shelter and protection against the cruelty and oppression of her husband.

This aid, shelter and protection may be lawfully rendered by a stranger upon the application and statement of the wife, showing its necessity, when acted upon in good faith.

In an action by the husband against a third party for thus harboring his wife, the burden is upon the plaintiff to establish the unworthy motives by which it was done; for when the defendant acts from motives of humanity toward the wife, and in good faith, the action will not lie.

JOHNSON, J. The theory upon which the case was submitted to the jury by the justice at the circuit, was, that if the defendant went by appointment and took the plaintiff's wife away to her father's, even though he went at her request, and acted in the honest belief that her statements in regard to her treatment and her apprehensions as to her personal safety were true, the act would not be justifiable; but that the defendant, in order to justify the act, must go further, and prove that her complaints were true in point of fact. The jury were told expressly that if the defendant had met her casually he would have been justified in acting upon her complaints, and taking her, as he did, to her father's; but not so if he went for her by appointment. The evidence tends to show very plainly that the defendant went that morning for the purpose of taking the wife to her father's, if she desired to go; and the inference is very strong that it was in pursuance of her request, and complaints which she made in regard to her treatment. He did not go upon the plaintiff's premises, but merely drove along the highway, stopping in front of the plaintiff's house, when the plaintiff's wife, in the exercise of her own volition, came from her house, got into the wagon, for the express purpose undoubtedly of being taken to her father's, and was taken there by the defendant. Evidently it was not a casual meeting, but a pre-

concerted one. But I am wholly unable to discover any substantial ground for the distinction made in the two cases, and am confident there is no principle of law upon which it can be maintained. If the defendant might have lawfully acted upon her statements that evening when they were just made, why not the next morning, when the time for the journey was far more suitable and proper?

Here was no such lapse of time as to affect the principle of law which must govern in a case like this. The question of sudden impulse or a few hours for reflection is obviously not the controlling one in a case of this kind, in point of law.

As evidence bearing upon the question of good faith on the part of the defendant in doing what he did, it would be important, and might turn the scale; but it would be evidence bearing upon a question of fact only, which must be determined before the question of law arises. This is an action sounding in tort. The mere act of the defendant in taking the plaintiff's wife in his wagon to her father's at her request was not in itself a tortious act, though done without the plaintiff's consent. No action could be maintained upon such an act alone. It is rendered tortious or wrongful by reason of the unlawful or improper motive which is alleged to have prompted it. The unlawful motive, or design, is charged in the complaint, and is the very gravamen of the action. It was the essential feature, without which the act was perfectly harmless and lawful. This was put in issue by the defendant, and the burden of establishing it by affirmative evidence was manifestly upon the plaintiff. Instead of this the burden was cast upon the defendant of justifying the act, as one which was tortious, *prima facie*, and irrespective of motive. If he went there by appointment, says the judge to the jury, the wife's statement of her wrongs and her peril afford no shield whatever, but the burden is cast upon him of proving that they were true. Even if the defendant believed them, and acted in good faith on such belief, the doctrine of the charge is, that he had no legal right to entertain such belief, or to act upon it the next morning after the statements were made. This cannot be the law. Here the plaintiff's

wife had left him, taking one child, and leaving one or more, and gone to her father's, where she had remained nearly two years when this action was commenced; and it is assumed that she had no good cause for thus leaving and remaining away, that her statements were either false, or of no consequence in a legal point of view; and the defendant is held answerable for her imputed misconduct in thus leaving and remaining away, unless he can prove affirmatively that the grounds she alleged for leaving were true. This would be the rule if the wife were the chattel of the husband, over which he had complete and perfect dominion as property. The removal in such case would be, *prima facie*, unlawful, and constitute a ground of action, unless justified by affirmative proof establishing the legal right to remove. But the wife, happily for the interests of society, bears a relation to the husband far different from this. Notwithstanding her marriage, and, for certain purposes, the merger or incorporation of her existence into that of the husband, she is still in law an individual, having separate rights, which the law will uphold and protect even against the husband; and amongst these is the right to invoke and receive aid, shelter and protection from others, even strangers, against the oppression and cruelty of the husband. This aid, shelter and protection may be lawfully rendered by a stranger upon the application and statement of the wife showing its necessity, if acted upon in good faith.

He may in such case treat the wife as a person, an individual entitled to credit, and invested with the rights and claims of, and upon, our common humanity. But he must be careful not to step beyond this legitimate boundary, into the field of undue influence and control, against the lawful rights and claims of the husband.

This was assumed to be the rule in the charge, provided the defendant had acted promptly at the first meeting and on the spur of the moment. It is neither unlawful nor improper in the wife to abandon a husband who treats her cruelly, and with whom it is unsafe for her to remain, and in such a case any one may, at her request, lawfully harbor or

assist her in removing to a place of safety. Such assistance is not against the lawful rights or claims of the husband. He has no legal right to her society or her services, if he treats her with cruelty, and makes her condition intolerable, provided she chooses to absent herself. Nor will the law permit the husband, in such a case, to recover damages for a loss thus occasioned from his neighbors, who may have merely assisted her, at her own request, in doing what the law allows her to do. I take it to be undoubted law, that in an action between the husband and a third party the loss of the society and services of the wife, who, at her own request and upon her statement of cruel and inhuman treatment at the hands of her husband, received shelter or aid in removing to another place, by such person acting in good faith, there is no legal presumption in favor of the husband that the wife's statements are untrue. And unlawful motives cannot be imputed to the defendant unless they are established by direct proof, or are fairly deducible from the facts and circumstances given in evidence on the trial. The wife's statements in such a case are in the nature of *res gestæ*, and evidence may be given by the husband, showing that they were unfounded, and that the other party did not credit them, but acted in the premises from some unworthy or improper motive. Thus, in the leading case of *Philip* v. *Squire* (Peake's Nisi Prius 82), which was an action for harboring the plaintiff's wife after notice not to do so, it appeared that the plaintiff's wife came to the house of the defendant, to whose wife she was related, and represented herself to have been very ill-used by her husband, who, she said, had turned her out of doors. Upon this representation the defendant received her into his house, and at her request suffered her to remain there after he had received notice not to harbor her. There was no proof that the husband had in fact ill-treated her. Lord KENYON, after stating the case, said: "But where she (the wife) is received from motives of humanity, the action cannot be supported. If it could, the most dangerous consequences would ensue, for no one would venture to protect a

married woman. It is of no consequence whether the wife's representation was true or false."

The rule laid down in this case is admitted to be the true one;—in the case of *Hutchinson* v. *Peck* (5 Johns., 196), all the judges agreeing that, when the defendant acts from motives of humanity toward the wife, and in good faith, the action will not lie. And so in the case of *Schuneman* v. *Palmer* (4 Barb., 225) it was held that the material point of the inquiry was the motive with which the defendant acted, and that the bare fact that the defendant had allowed the plaintiff's wife to ride with him in his wagon to his house, and remain there contrary to a notice from the plaintiff, was not enough. See also *Turner* v. *Estes* (3 Mass., 317).

The *gist* of the action, as all the authorities agree, is the loss, without justifiable cause, of the comfort, society and services of the wife. In maintaining the action, two questions principally arise: was the loss occasioned by the voluntary act of the wife upon justifiable cause; or was it occasioned by the acts or persuasion of the defendant, without any real cause, and in bad faith toward the plaintiff? On both these questions the plaintiff must give evidence tending to make out a case, or his action must fail. As was said by Chief Justice WILLES in *Wensmore* v. *Greenback* (Willes, 581), "though it should be said that the plaintiff lost the comfort and assistance of his wife, yet if the fact be that that by which he lost it be a lawful act, no action can be maintained. By *injuria* is meant a *tortious* act."

The charge concedes that if the wife's complaints were well founded, she had justifiable cause for leaving, and the defendant would be justified in assisting her as he did, even though he went by appointment for the purpose. This is undoubtedly the law, provided always that the defendant was acting in good faith and from motives of humanity and kindness to the wife.

The error in this part of the charge is that it overlooks entirely the question of motive, and casts the burden upon the defendant of proving the truth of the wife's statements. If he went there by appointment, in the first instance, it

makes the mere act, in that case, a tort, however honestly or humanely the defendant may have acted, and excuses the plaintiff from the necessity of giving any other evidence in support of his action.

In assuming that the defendant acted in what he did at the request of the wife, and in the belief that her statement was true, and for the purpose of removing her to a place of safety, his conduct was not only justifiable, but free from all just ground of censure. He might have kept her at his own house, but, under all the circumstances, it was more discreet and prudent in him to take her to her father's, who was her natural protector and better fitted to advise her in respect to her future course than himself, who was on unfriendly terms with the plaintiff. If he arranged with her to come to her assistance during the night, in case of violence attempted, or inflicted, and to take her to her father's in the morning, in good faith, there was nothing unlawful in it, and the advice, under such circumstances, to the wife to go to her father for shelter and safety, was such as he had a right to give. If the conduct of the plaintiff toward the wife was such as she represented, she was clearly justifiable in leaving him and going to her father's, and any one would be justified in advising and assisting her in doing so upon her application for protection and assistance. It was a lawful and proper act on her part, and the husband cannot complain if it was the result of his own misconduct. For this error alone, the judgment should be reversed, as the jury might well have found, and probably did, that the defendant went to the plaintiff's on that occasion by appointment.

The jury were also charged in substance and effect, that they had no right to consider the defendant's statement, in respect to the plaintiff's treatment of his wife, unless the defendant had stated it as a fact, and not as the representation of the wife. This was also error, for the reasons above given. The jury were also instructed that if they should find that the defendant had stated the matter of ill-treatment as a fact and not as the representation of the wife, they might consider those statements, and had the right to believe

a part, and reject other parts. That they might believe the fact admitted and reject the reasons given. If this was laid down to the jury as a right which they might exercise arbitrarily, as it seems to have been on the face of the charge, it was erroneous. The plaintiff had introduced the confessions of the defendant, and it was the clear right of the latter to have all he said upon the subject at the time taken and considered together. He had the right to the benefit of that portion which tended to excuse or justify the act. If the whole statement taken together does not make out a cause of action, the action must fail if there is no other evidence to support it. (*Credit* v. *Brown*, 10 Johns., 365; *Smith* v. *Jones*, 15 id., 229.) It is quite true that the jury are not necessarily bound to give equal credit to all parts of a statement or confession. If one part is highly improbable, or there is other evidence tending to discredit it, and the jury can see from all the other facts and circumstances of the case, grounds for disbelieving it, they may do so, and give credit to other portions of the statement. (*Kelsey* v. *Bush*, 2 Hill, 440; 1 Greenl. Ev., §§ 201, 218.) With this qualification the rule laid down in the circuit would be correct. The jury had, of course, the right to take into consideration the unfriendly feeling of the defendant toward the plaintiff in respect to this, as well as the other portions of the case. If the defendant was unfriendly to the plaintiff, however, he had the same legal right to assist and harbor the wife of the latter, as though he had been on the most friendly terms. The state of his general feelings toward the plaintiff would not be conclusive one way or the other, on the question of motive, in the particular case. It is quite obvious that it would require less evidence to establish the improper motive in the former, than in the latter case. My conclusion is that the judgment should be reversed, and a new trial granted, with costs to abide the event.

Judgment reversed.

HENRY H. BABCOCK, and others, Respondents, v. FRANCIS A. UTTER, and others, Appellants.

A parol license cannot be regarded as a grant in fee, whenever the rights claimed thereunder are such as cannot be created by parol.

But if the parol license be accompanied by a parol grant of that which is capable of passing by parol, then the license may be deemed a part of the grant.

Thus, a parol license to enter upon the land of the licensor, to sever from the freehold and take certain articles, might be good; but if such license were claimed to be perpetual, it would not be good, as such an estate cannot be created by parol.

Where one enters upon land and holds under a license, his possession is not adverse, and no presumption arises from such holding.

Where the mortgagor, being in possession of the premises, mortgages the same without using the word "appurtenances," his entire legal estate in the premises is included in the mortgage, the same as if the word "appurtenances" had been used in the usual manner.

THIS action was commenced by the plaintiffs in the Supreme Court in equity, in September, 1847, to have their right to a stream of water declared and established; to obtain a perpetual injunction against the diversion of the stream from their factory, and to recover damages for previous diversions.

The facts appearing from the pleadings and the report of the referee before whom the cause was tried, so far as they have any material bearing upon the questions presented on the present appeal, are substantially as follows:

On and prior to April 1, 1820, William Utter, one of the defendants, was the owner of eleven acres of land in the town of Plainfield, Otsego county, and also of another lot of four acres north of and adjoining the eleven acres, both pieces being bounded on the west by the west branch of Unadilla river. In the year 1821, said Utter in contemplation of erecting carding and cloth-dressing works on the eleven acres, constructed a dam across said west branch, on lands some distance north of his own, which were owned by Henry Clarke on the west side, and by Isaiah Hilliard on the east side of said branch. During the same year he constructed a canal from said dam, southerly across the lands of

said Hilliard, of Thier Johnson, and the two pieces of four and eleven acres before mentioned, to the southerly side of the eleven acres, for the purpose of propelling machinery thereafter to be placed on said premises, with water to be drawn from the dam, through said canal. In 1821, or 1822, he erected on the eleven acres a saw-mill and carding and cloth-dressing works, and placed therein machinery proper to be used in such works, and put the same in operation, the propelling power being the water drawn from the dam, through said canal. In 1824, he obtained, from Isaiah Hilliard, a lease for the term of ten thousand years, of three-quarters of an acre of land, on which the east end of the dam stood, together with the right of flowing so much of the land of said Hilliard as would be flowed by a dam five feet six inches high, measuring from the bed of the stream, at an annual rent of $7. The canal was made over the lands embraced in this lease. Henry Clarke verbally consented to the abutting of the west end of the dam on his land, and the canal was constructed across the land of Thier Johnson, with his assent, and the license so given by Clarke and Johnson the referee finds has never been revoked.

William Utter, and those claiming under him, used said saw-mill and clothing works, and carried on the business of sawing lumber and dressing cloth therein, by means of water drawn through said canal, and from no other source, until August, 1831; and there was no other source from which water for that purpose could be obtained.

In August, 1831, said Utter executed and delivered to William Johnson a mortgage upon the eleven acres upon which the mills and machinery stood, describing them by metes and bounds, but without the word "appurtenances," or other equivalent words, and without any reference to the mills or machinery, or any improvements upon the land. The mortgage was duly acknowledged and recorded, and became a valuable lien upon the premises. At the time when the mortgage was given, the mills and machinery were in use, and the water for propelling such machinery was drawn from the said canal.

On the 15th of December, 1834, there was due upon the mortgage $2,611.55; and he thereupon proceeded to foreclose the mortgage by advertisement, pursuant to the statute, and on the 2d of June, 1835, the premises were sold at auction, in accordance with the advertisement, and purchased by the mortgagee. Johnson, by his tenants, occupied the said premises, mills and machinery, from the time of his purchase until April 10, 1846, when he entered into a contract with the plaintiff, Babcock, for the sale of the premises to him for the consideration of $1,100, and gave him immediate possession. In the following August, the purchase price having been paid, Johnson, by quitclaim deed, conveyed the premises to Babcock, who, in November thereafter, conveyed five-sixths thereof to his five co-plaintiffs in this action, the purchase having been made originally for the use of all those parties.

The plaintiffs removed the buildings used by Utter for a saw-mill and clothing works, and erected in their stead a valuable building for a hoe factory, and used the same for the manufacture of hoes, propelling the machinery with water taken from the dam erected by Utter, and through the canal constructed by him.

William Utter and others, who occupied the 11 acres and used the mills and machinery thereon, found it necessary on several occasions to repair the dam, and for that purpose to use gravel from a pit on the farm of Henry Clarke, or those claiming under him, and before making such repairs on some of those occasions, leave to go upon the farm to get gravel for that purpose was asked of the owners or occupants and granted. On some two or three or more occasions, while William Utter was in possession, permission was asked from Henry Clarke, to go upon his land to repair the dam. The right of Utter and those claiming under him, to maintain the dam and canal, or ditch, and draw water through the ditch, was never called in question by any of the owners of the lands, on which the dam abutted, and over which said canal or ditch was dug, until after the contract was entered into

between Johnson and Babcock, in April, 1846, for the purchase by the latter of the 11 acres.

Henry Clarke, who was the relative and intimate friend of William Utter, died in 1831, seized of the farm on which the west end of the dam in question stood, leaving a will, duly executed, by which he devised the farm to his three sons. On the 27th of May, in the same year, and after the death of their father, the three sons conveyed the farm to Ethan Clarke, one of the defendants in this action, but bounding him by the westerly bank of said river, instead of by the center, to which the farm extended, as described in the patent from the State to said Henry Clarke. The material part of the descriptive portion of the deed to Ethan Clarke, is as follows, viz.: "Beginning at a stake and stones on the west bank of Unadilla river, at the north corner of widow Clarke's farm; thence south five chains and thirteen links, to a stake and stones; thence," etc. [giving a great number of courses and distances, the two last of which are as follows]: "thence north, eighty-five degrees east, twenty-four chains and thirty-four links, to the Unadilla river; thence down the west bank of the Unadilla river, as it winds and turns, to the place of beginning, containing," etc.

In March, 1839, William Utter, in consideration of $50, assigned to the defendant, Francis A. Utter, and Jacob S. Utter, the above-mentioned lease from Hilliard, and in August, 1846, Jacob S. Utter assigned his interest to said Francis A.

On the 4th of May, 1846, Ethan Clarke, the grantee above mentioned granted to said Francis A. Utter, by an instrument in writing under his hand and seal, in consideration of the sum of $15 to be thereafter annually paid by said Utter, the exclusive privilege of maintaining so much of the aforesaid mill-dam as was located on said Clarke's premises; also the privilege of controlling the water by dams and dikes to the center of said west branch for fifteen rods above the dam; also the privilege of controlling said water down said west branch along its bank, to the center of the stream, to the south-east corner of said Clarke's lands; also the privi-

lege of taking earth or gravel from the bank, as had been theretofore accustomed, for repairing the dam, with the privilege of access to the gravel bank.

Before this lease was obtained, Francis A. Utter had been informed that Babcock had a contract for the purchase of the mill property; and some time in May, 1846, while the plaintiffs were pulling down the old buildings preparatory to the erection of the hoe factory, he forbade the plaintiffs to use the water-power, claiming to own the water-right himself by lease; and he delivered to Babcock a written notice to the same effect, in August thereafter.

After the erection of their new factory the plaintiffs put the machinery therein in operation by means of water drawn from said dam through the canal before mentioned, and the water so drawn was the only power used on said premises from the time of the construction of the dam and canal. The factory would be substantially valueless without the benefit of that water-power, and the said premises are valuable mainly for the water-privilege created by said dam and canal, and used thereon.

In August, 1847, the defendant, Francis A. Utter, employed the other defendants in this cause to obstruct, and they did obstruct the flow of water from the said dam to the plaintiff's factory; and they diverted the water from the above-mentioned canal into a bulkhead and canal constructed by them upon the opposite side of the river, upon the farm formerly owned by Henry Clarke. Such obstruction and diversion were made by said Francis A. Utter, under claim of right, under and by virtue of the lease to him above mentioned. The plaintiffs were interrupted in their business by such diversion for the space of twenty-three days, and the damages thereby were $50.

Upon these facts the referee found as conclusions of law:

1. That William Utter, having constructed the dam and canal, with the license of the then owners of the land, on and over which said dam and canal were located, and having erected mills and placed therein machinery, to be operated with water obtained from said dam and canal, he

and his grantees were entitled to the use of said water, dam and canal, for the factory then on said premises, and that the license so granted was irrevocable.

2. That the right of Utter to said dam, canal and water, passed to Johnson, the mortgagee, by the mortgage from Utter to him, and the foreclosure and sale under such mortgage.

3. That Utter and those claiming under him were estopped from asserting any claim or right under the Hilliard lease, or by virtue of the four acres lying northerly of the mill premises.

4. That the defendant, Francis A. Utter, acquired no right to divert the water of said west branch, by virtue of the lease from Ethan Clarke, as Clarke had no title to the waters of said branch.

5. That the plaintiffs were entitled to damages for the diversion of said waters, and to the other relief, thereafter in the report mentioned. Then followed a direction for judgment, declaring the right of the plaintiffs to maintain a dam across the west branch at the place where the same had theretofore stood, at the height at which it had been maintained; to flow so much land as had been heretofore flowed by said dam, and to maintain a canal or ditch from said dam to the factory of the plaintiffs, at the place where the canal had been located and used, and to draw through such canal to their hoe factory, the quantity of water which had been theretofore drawn through the same. And that the defendants be perpetually enjoined from diverting, or in any manner interfering with said dam and canal, or the flow of water in and along the said canal. Also, that the plaintiffs were entitled to recover $50 damages for the diversion of the water, and costs, against Francis A. Utter, and that the complaint should be dismissed as against the defendants William and Morris W. Utter.

Judgment was entered in accordance with the directions of the report, and the defendants, having excepted to the conclusions of law found by the referee, appealed to the General Term of the Supreme Court, where the judgment was affirmed, and the defendant, Francis A. Utter, appealed to this court. The cause was submitted on printed briefs.

Philo Gridley, for the appellant.

Gardner & Burdick, for the respondents.

SELDEN, J. The first question presented by this case is, what were the rights of William Utter in this water-power, when he executed the mortgage of the eleven acres to John son, in August, 1831? It is in effect declared by the judgment, that the construction by the plaintiff of the dam and the canal in pursuance of the license of Henry Clarke and Thier Johnson, the construction of his mills on the eleven acres, and putting his machinery therein in operation by water drawn from the river by means of such dam and canal, gave to him, as against said Clark and Johnson and persons claiming under them, a right perpetually to maintain the dam and canal and use the water as they were then maintained and used. This judgment rests upon the position that the license, after the construction of the dam, canal and mills, was irrevocable. If this position be sustained, then the parol license, by means of the expenditure made in pursuance of it, was deprived of its character as a license and became a grant in fee of the rights claimed by the plaintiff. In my opinion this conclusion is in conflict with well-established principles. There are many cases in which licenses, so called, and perhaps properly so called, have been regarded as grants, in consequence of their character, and of what has been done under them; but in all such cases, with the exception of a few which have been very generally condemned (Brown on Stat. of Frauds, §§ 28, 29; 3 Kent's Com., 453), the rights which have been established were such as might have been granted by parol. Whenever the right claimed was such as could not be created by parol, it has been denied, whatever may have been done under the license. The nature of both classes of licenses, those connected with grants capable of taking effect by parol, and those not thus capable, is clearly pointed out by Baron ALDERSON, in his able opinion in the case of *Wood* v. *Leadbitter* (13 M. & W., 838), in the course of which he states as an illustration of the latter class, the precise case now under consideration.

He says (at p. 845), "A mere license is revocable; but that which is called a license is often something more than a license—it often comprises or is connected with a grant, and then the party who has given it cannot in general revoke it so as to defeat his grant, to which it is incident. * * But where there is a license by parol, coupled with a parol grant, or pretended grant of something which is incapable of being granted otherwise than by deed, there the license is a mere license; it is not an incident to a valid grant, and is therefore revocable. Thus a license by A to hunt in his park, whether given by deed or by parol, is revocable; it merely renders the act of hunting lawful, which without the license would have been unlawful. If the license be not only to hunt, but also to take away the deer when killed, this is in truth a grant of the deer, with a license annexed to come on the land; and supposing the grant of the deer to be good, then the license would be irrevocable by the party who had given it; he would be estopped from defeating his own grant, or act in the nature of a grant. But suppose the case of a parol license to come on my lands, and there to make a water-course to flow on the lands of the licensee. In such a case there is no valid grant of the water-course, and the license remains a mere license, and therefore capable of being revoked. On the other hand, if such a license were granted by deed, then the question would be on the construction of the deed, whether it amounted to a grant of the water-course; and if it did, then the license would be irrevocable." The cases of license to enter upon the land of the licenser, and to cut and remove trees, or to dig and carry away gravel, or to quarry and remove marble, and the like, are licenses of the class first mentioned, where the grant connected with the license, when executed, is valid. The license in such cases renders lawful the entry and severance of the article granted, which would otherwise be a trespass, and the grant operates as a gift of the severed article, a parol gift of which would be effectual upon delivery. But if under such a license to take marble a perpetual right were asserted, on the ground that the license was irrevocable, the case would fall within the

second class, and the right could not be maintained, as it could not be created or granted by parol; nor would it aid the licensee to show that he had been induced by the license, with the knowledge of the licenser, to erect expensive works on his own adjoining land, for the purpose of working the marble. (Browne on Stat. of Frauds, §§ 27, 28.)

The law in this State, and generally in the United States, as well as in England, is in entire accordance with the opinion of Baron ALDERSON, above mentioned. The subject has been so often and so fully discussed, that a review of the cases would be a useless labor. Mr. Washburn, in his Treatise on Real Property, has stated with perfect accuracy the substance of prominent cases bearing directly upon the point under discussion, and I avail myself of his summary of the cases, as sufficient for the present occasion. He says: "In the cases of *Cook* v. *Stearns* (11 Mass., 533); *Cowles* v. *Kibber* (4 Fost. [N. H.], 364); *Stevens* v. *Stevens* (11 Metc., 251), and *Munford* v. *Whitney* (15 Wend., 380), the license was to erect a dam or a part of one on the licenser's land, for raising a head of water to work a mill of the licensee, which was held to be revocable after the dam had been erected, without reimbursing the licensee for his expenses thereby incurred. In *Morse* v. *Copeland* (2 Gray, 302); *Hewlins* v. *Shippam* (5 B. & C., 221); *Fentiman* v. *Smith* (4 East., 107); and *Sampson* v. *Burnside* (13 N. H., 264), the license was to dig a ditch or tunnel in the licenser's land, to divert the water of a stream to or from the land of the licensee, and it was held to be revocable, though executed, without remuneration to the licensee for his expenses thereby incurred. In the cases of *Prince* v. *Case* (10 Conn., 378), and *Jackson* v. *Babcock* (4 Johns., 418), a license to erect a house on the licenser's land was held to be revocable after the erection of the house. In *Hazleton* v. *Putnam* (3 Chand. [Wis.], 117), a well considered and ably reasoned case, where the owner of lands licensed the owner of a mill site situate below these to flow them for the working of his mill, it was held to be a revocable license after the licensee had erected his mill and dam." (1 Washb. on Real Property, 400, *note.*) To the

same effect are the cases of *Jamieson* v. *Milleman* (3 Duer., 255); *Foot* v. *New Haven and Northampton Company* (23 Conn., 223); *Eggleston* v. *New York and Harlem Railroad Company* (35 Barb., 162). The decision in the court below is in conflict with all the foregoing cases, and others which might be referred to, and I think it equally in conflict with the common law rule, that an easement can only be created by deed (or its equivalent prescription), with the statute of frauds, prohibiting the conveyance of any interest in lands, other than short leases, without writing (2 R. S., 134, § 6), and with the statute requiring deeds for the conveyance of freehold interests. (1 R. S., 738, § 137.)

In my opinion, the principle upon which the decision of the court below rests, would substantially repeal the common law rule and the statutes above referred to; for there is no interest in lands which may not be made the subject of such irrevocable license. As has been well said by Mr. CHITTY, "If a person could acquire a perfect right by a license, any one has only to get a person to swear to a parol license by the owner of land to build a house upon it, and thereby without any conveyance by deed, he would acquire, in effect, all the beneficial right of an owner in fee." (1 Gen. Prac., 339; *Benedict* v. *Benedict*, 5 Day, 464; Browne on Stat. of Frauds, § 29.)

We have been referred to no reported cases having any tendency to sustain the decision that the license in question was irrevocable, except those of *Revick* v. *Kern* (14 S. & R., 267) and *Hepburn* v. *McDowell* (17 id., 383). The last of these cases contains nothing inconsistent with the rule to be deduced from the cases to which I have referred, excepting the approval by the judge who delivered the opinion, of the case of *Revick* v. *Kern*. The latter case, treating it as one of license and not of contract, is certainly not law in this State, if it is anywhere beyond the jurisdiction within which it was decided. (*Jamieson* v. *Milleman*, 3 Duer., 261; 1 Washb. on Real Property, 400, *note*.) The note of Messrs. Clark and Wallace, to the case of *Revick* v. *Kern*, (2 Am. Lead. Cases, 514, 1st ed.), so far as an attempt is made to

sustain the soundness of that decision, is not very satisfactory in its reasoning, and the learned authors seem not to have found much in the way of authority to support it. The effort to sustain it appears to have deprived the note of the clearness and consistency which usually characterize the notes in that valuable work.

The English cases which have been supposed to give some support to the doctrine of the irrevocability of licenses under such circumstances as this case presents, were reviewed by Baron ALDERSON, in the opinion before referred to, and their insufficiency to sustain that doctrine was clearly demonstrated.

There is another class of cases which have been invoked in support of the same doctrine; viz.: where the owners of lands who have encouraged others to expend money upon them, under an erroneous opinion of title, have been prohibited from afterward asserting their legal rights. (*Wendell* v. *Van Rensselaer*, 1 Johns. Ch., 354.) The bases of these cases is fraud on the part of the owner of the land; and where the person making the expenditure knows the state of the title, he makes it at his peril, and acquires no equitable rights against the owner thereby. (Browne on Stat. of Frauds, § 29.)

The doctrine of the presumption of a grant arising from twenty years' adverse possession, has been urged in support of the plaintiffs' claim; but where one enters and holds in pursuance of a license, the holding is not adverse, and no such presumption can arise out of it. It follows from what has been said, that the only right which William Utter possessed at the time of the execution of his mortgage to Johnson, to so much of his water-power as depended upon the license of Henry Clarke, was the right to the use of such power so long as the heirs or assigns of Henry Clarke saw fit to allow such use, and no longer. That right was merely personal, and was not susceptible of conveyance to another party. (Browne on Stat. of Frauds, § 22.) Johnson, therefore, derived no title to that portion of the water-power through the mortgage of Utter. As Henry Clarke owned

upon one side of the river, and Isaiah Hilliard upon the other, where the same was erected, each was the owner of one-half the stream, and consequently this deficiency of title in Johnson extended to one-half of the water-power.

As to the other half of the stream, Utter had a perfect title so far as related to the right to maintain the dam for the long term specified in his lease from Hilliard, and to draw the water from the river, and through the canal for its whole length, excepting that part where it crosses the lands of Thier Johnson, and in that respect his right (upon the principles above laid down) depended entirely upon the pleasure of Thier Johnson, or of those who may have become his successors. That right, too, derived from the license of Thier Johnson, was merely personal, and did not pass by force of the mortgage to William Johnson.

Utter, however, had power to convey the entire right to his half of the water-power, subject to the right of Thier Johnson to revoke the license allowing the maintenance of the canal and the flow of the water across his land.

The question then arises, whether, by the mortgage to Johnson, Utter conveyed all the right which he possessed in this half of the water-power (which would give to the mortgagee a perfect title, with the exception of the right to maintain the canal and conduct the water across Thier Johnson's land), or only so much of his right as was comprised within the boundaries of the eleven acres described in the mortgage. I entertain no doubt upon this question. At the time when the mortgage was executed, the mill was in operation, its machinery being driven by water drawn from the river, by means of the dam and canal, and such right to the water-power as the mortgagor possessed, not depending upon mere license, and therefore incapable of conveyance, passed by the mortgage to the mortgagee. (*Huttemeier* v. *Albro*, 18 N. Y., 48.) It is not material in this respect, that the conveyance does not contain the word "appurtenances," or any equivalent expresssion, nor that it contains no reference to the mill. The deed is to be interpreted as though it had been executed and delivered between the parties in view of the premises,

and thus interpreted, it must be held to convey the mill, *as such*, as fully and completely as if it had been expressly named in the grant, and with the mill, all the appurtenances, which were at the time connected with it, and which gave it its value as a mill, so far as the grantor had power to convey the same. This is expressly decided in the case of *Oakley* v. *Stanley* (5 Wend., 523), and there is nothing in the case of *Tabor* v. *Bradley* (18 N. Y., 109), under the peculiar circumstances disclosed in that case, which is inconsistent with this position.

William Johnson, therefore, by virtue of his mortgage and its foreclosure, obtained a title to one-half of the water-power subject to the right of Thier Johnson, to stop the flow of the stream across his premises at pleasure, and perhaps subject also to a forfeiture of his right to the water in case of default in payment of the rent on the lease of Hilliard. The conveyance of the mill did not operate as an assignment of the whole interest of the lessee in the demised premises, but only of his right to maintain the dam and canal, and to conduct the water across such premises. If the lands leased possessed value for any other purpose, to that extent the interest of the lessee was not affected by the mortgage to Johnson, but passed to Francis A. Utter on the assignment of the lease to him. The rent in such case would doubtless be apportioned between the assignees according to the value of their several interests. (Gilbert on Rents, 153; 3 Kent's Com., 470; *Van Rensselaer* v. *Bradley*, 3 Denio, 143.)

This qualified title to one-half the waters of the river was vested in the plaintiffs at the time of the commencement of the action, and it constituted the extent of their *title* to the water-power which they were using at the time of the interference by the defendants. What right they had as licensees or otherwise to the other half of the waters of the river, depends upon the state of the title to that half which is next to be considered.

It has already been shown that the title to one-half the waters of the river, notwithstanding the license to Utter, and what was done by him in pursuance of such license, remained

in Henry Clarke at the time of his death, as he had the right at any time during his life to revoke the license, remove the dam and apply the waters to any use, or allow them to flow in their natural channel. This title passed by his will to his three sons, and remains in them still, so far as the case shows, unless it passed to Ethan Clarke, by virtue of the conveyance of the farm by them to him on the 7th of May, 1831. The description in that conveyance begins, "at a stake and stones on the west bank of the Unadilla river," as a starting point in the boundary line, and runs thence by courses and distances around the farm until it comes again "to the Unadilla river," and runs "thence down the west bank of the Unadilla river as it winds and turns, to the place of beginning." The words "to the Unadilla river," according to the usual interpretation of such an expression in conveyances, would carry the line to the center of the river, as the general rule is that where a line touches a river it goes to the center; but the words are entirely consistent with an interpretation which should stop the line at the margin or bank of the river: and whether the one or the other interpretation should be given to them must depend upon the apparent intention of the parties, to be determined by reference to the other portions of the deed. The other expressions of the deed which have reference to the river I think show a clear intention to limit the operation of the grant to the bank of the river. The starting point is unequivocally from "the bank," and not from the center of the river, and if the last line in the description is confined to the center of the river, it cannot run "to the place of beginning," as the description requires; and if it starts from the center of the river, and runs "to the place of beginning," it would neither follow the center of the river nor "the west bank as it winds and turns," according to the description in the deed. From the terms of the deed alone, I think it must be held to convey the farm to the west bank of the river only, leaving the title to the river and the land covered by it in the grantors. (See *Childs* v. *Starr*, 4 Hill., 369.) This construction is strongly confirmed by the circumstances

which may properly be considered as bearing upon the interpretation of the deed, that the river was at the time of the execution of the deed by the grantors controlled and used by their father's friend, in pursuance of license granted by him ten years before his death, and which he had not seen fit during his lifetime, nor the grantors, his sons, after his death, to revoke.

It will thus be seen that the right to that part of the water which is not vested in the plaintiffs remains in the three sons, devisees, of Henry Clarke. Ethan Clarke obtained no title to it by his deed from them, and consequently conveyed none by his demise to Francis A. Utter. The defendants, therefore, were entirely without right to interfere with the dam, or to divert the water of the river from the plaintiffs' factory. The only remaining question is whether the plaintiffs are entitled to recover damages for the diversion of the water. It appears that the whole stream was diverted from their factory, and as their title to half of it was complete, so long as Mr. Thier Johnson allowed it to flow across his premises, there can be no doubt of their right to recover the damages occasioned by the diversion of such half. In regard to the other half, their right, so long as the license to use it remained unrevoked, was a perfect possessory right, sufficient to sustain an action for its diversion against strangers. The referee reported that the license had never been revoked, by which I understand that there had been no direct revocation by Henry Clarke, or his successors in interest. The death of the original licenser was itself a revocation (1 Washburn on Real Property, 399 section 9), but it was optional with his devisees to enforce the revocation, or renew or continue the license, and their acquiescence in the use of the water by the licensee and his successors, from the death of their father in 1831, until the time of the commencement of this action in 1847, without interfering with or forbidding such use, may doubtless be regarded as sufficient evidence of the confirmation of the license, by them, in favor of the successive occupants of the mills. The plaintiffs were, therefore, entitled to recover the damages which they sustained by the diversion of

the water, unless a revocation of the license by the devisees of Henry Clarke, prior to such diversion, can be shown. As the license was held irrevocable on the former trial, there was no object in the introduction of proof of such revocation, if it existed, as it would have been, under that ruling, wholly unavailing.

The judgment of the Supreme Court should be reversed and a new trial should be granted, as against the defendant Francis A. Utter, with costs to abide the event.

The defendant, Ethan Clarke, has not appealed from the judgment of the General Term of the Supreme Court, and that judgment as against him remains undisturbed.

Isaiah Hilliard, who is named in the papers as a defendant, does not appear to have been served with process, or to have appeared voluntarily, and he is not therefore a party to the action. The judgment dismissing the complaint as against the defendants, William Utter and Morris W. Utter, has not been appealed from; consequently they have ceased to be parties, although their names are still continued in the papers. In all future proceedings Francis A. Utter, alone will be the only proper party defendant.

All the judges concurring, except HOGEBOOM.

Judgment reversed.

HOGEBOOM, J. This is an appeal by the defendant, Francis A. Utter, from a judgment for the plaintiffs, entered upon the report of a referee, and affirmed by the Supreme Court at General Term.

The action was brought to establish and declare the rights of the plaintiffs in and to a certain water-power, arising in, and flowing from, the Unadilla river, in the county of Otsego, to restrain the defendants from the diversion of the water, and to recover damages for the diversion already made. The judgment appealed from was in favor of the plaintiffs in all these particulars.

The rights claimed by the plaintiffs and sustained by the judgment, are to maintain a dam across the west branch of the Unadilla river, and a canal or ditch leading therefrom to

the hoe factory of the plaintiffs, some distance below; and to pass through such canal so much of the waters of the Unadilla river as shall be necessary to operate the plaintiffs' works in the manner, and to the extent they have been hitherto enjoyed.

The dam was erected in 1821, across the Unadilla river, by William Utter, who did not own the lands on either side of the stream at that point; the dam on the north or west shore resting on lands of Henry Clarke, and on the south or east shore, on lands of Isaiah Hilliard. The canal passed southerly from the south side of the stream through lands of Isaiah Hilliard, then into and through those of Thier Johnson; then into and through a four acre lot of William Utter; then into an eleven acre lot of William Utter, on which last mentioned premises the factory of the plaintiffs is situated.

The plaintiffs claim title thereto, and to the water-power in question through William Utter. Utter having mortgaged the eleven acre lot at an early day, and after he had erected his manufacturing works, to William Johnson, Johnson having foreclosed the mortgage, and on such foreclosure became the purchaser, and having subsequently conveyed the same to the plaintiffs.

The defendants claim under Henry Clarke, who died in 1831, having devised the premises on the west side of the river, on which the plaintiffs' dam abutted, to his three sons. They conveyed to Ethan Clarke, and the latter granted to Francis A. Utter, by an instrument under seal, the exclusive privilege of maintaining so much of the mill as was located on said Clarke's premises, and also the privilege of controlling the water by dams and dykes to the center of the stream, for fifteen rods above the dam, and below the dam to the south-eastern terminus of Clarke's land. A question is made whether the deed to Ethan Clarke carried him further east than to the west bank of the stream, instead of to the center, as the defendants claim. This question, if important, will be subsequently considered.

The defendants also make claim to the land where the dam is located, and adjoining the same on the south or east

side of the stream. This claim is through William Utter, who in 1824 obtained a lease of the same from Isaiah Hilliard (the then owner) for 10,000 years. In 1839 William Utter, in consideration of $50 advanced by Francis A. Utter, assigned to him and to his brother, Jacob Sherrill Utter, the lease above mentioned, from Hilliard to William Utter.

Francis A. Utter is the principal defendant, and the other defendants are made parties to the suit as having co-operated with him in the act of tapping the dam and diverting the water, which led to the institution of the suit.

The defendants thus claim to have had the ownership and the rightful control of both banks of the stream at the places where the dam at its opposite extremities touched the shore, and consequently to have had the legal right to control the dam, and, if they pleased, to divert the water, inasmuch as the plaintiffs are not riparian proprietors on the stream below. They further claim that, whether their acts were lawful or unlawful, they are not answerable to the plaintiffs, whom they insist not to be either the lawful proprietors of the dam, or of the water-power, or of the right to divert and draw the water through the canal to their works.

The plaintiffs' claim arises in this wise: When William Utter built his dam across the river, in 1821, and before he constructed the same, he obtained the verbal consent and permission of Henry Clarke to abut the north or west end of his dam on his land. This license was never revoked. On the opposite side of the stream William Utter, as before stated, obtained from Hilliard, in 1824, a lease of the land for 10,000 years. He also obtained from Thier Johnson, across whose lands the canal passed after leaving those of Hilliard, a verbal consent to construct said canal across his lands. This license has never been revoked. The residue of the lands over which the canal passed, being the four acre lot and the eleven acre lot, were lands belonging to William Utter himself.

"In 1821 or 1822, William Utter erected on the eleven acre lot a saw-mill and carding and cloth-dressing works, and placed therein machinery proper to be used in such works,

and operated the same, the propelling power being the water drawn from said dam through said canal."

So far as appears, this use of the dam, the water, the canal, the mills and machinery, continued without objection or interruption up to 1846. In that year the plaintiff Babcock, for the benefit of all the plaintiffs, contracted to purchase the same from the then owner, Johnson, and in August, 1846, obtained from Johnson a quitclaim deed of the eleven acres. In November, 1846, he conveyed an undivided interest therein to the other plaintiffs.

"After such purchase the plaintiffs removed the buildings used by Utter for the saw-mill and clothing works, and erected in their stead a valuable building for a hoe factory, and used the same for that purpose, propelling the machinery therein with the water from the dam erected by said Utter as aforesaid, through said canal or ditch."

The said Utter and others, who occupied the eleven acres, and carried on the mills and machinery thereon, found it necessary on several occasions to repair the said dam, and for that purpose to use gravel from a pit on the lands of Henry Clarke, or those claiming under him. And before making such repairs on some of such occasions, leave to go on to said farm to get said gravel to repair the dam was asked of said owners or occupants, and granted.

On some two or three or more occasions, while William Utter was in possession, permission was asked from Henry Clarke to go upon his land to repair the dam. The right of Utter and those claiming under him to maintain said dam and ditch, and draw water through said ditch, was never called in question by any of the owners of the lands on which said dam abutted, and over which said canal or ditch was dug, until after the contract was entered into between said Johnson and Babcock for the purchase of said eleven acres.

The mortgage by Utter to William Johnson, before mentioned, was given in 1831, upon the eleven acre lot on which the mills and machinery stood and were operated. It described the premises by metes and bounds, but without the

word "appurtenances," or other equivalent words. It was foreclosed in 1834 and 1835, and the premises were purchased by the mortgagee, who entered into the occupation thereof, and, as before stated, subsequently sold and conveyed the same to Henry H. Babcock, for himself and the other plaintiffs.

On this state of facts, the plaintiffs claim that the construction of the dam and the ditch, the mills and the machinery, under the verbal permission of the owners on both sides of the stream, never withdrawn, and the written lease of the owner on the south side, the erection of valuable buildings and the expenditure of large sums of money for the apparent purpose of a continuing and permanent business, before the eyes and in the presence of the owners of the land on both sides of the stream, and the continued operation of these improvements for manufacturing purposes for a long series of years, without objection or interruption, constitute, in equity, an irrevocable license from such owners to the continued use of the stream for the purpose named, and perpetually forbid any interference on the part of such owners with privileges thus enjoyed by their express consent and permission, and that the plaintiffs are the legitimate successors to the rights thus granted to William Utter, under the mortgage foreclosure, as incidents and appurtenances to the ownership of the eleven acres, notwithstanding the mortgage did not in terms contain any reference to the dam, canal, water-power, or the mode of the use thereof.

The position of the defendants, on the other hand, is that the right to abut the dam on the shores of the river was a right pertaining to real estate, and involved an interest in lands which could not pass or be conferred otherwise than by deed or writing; that the license was verbal and without consideration, and liable at any time to be withdrawn or revoked; that it could not ripen into a right by lapse of time, because there was no adverse possession, but one always held and enjoyed in subordination to the rights of the true owner; that whatever may have been the rights of Utter, they did not pass by the foreclosure of the mortgage to Johnson, inas-

much as the rights now in question were not mentioned or alluded to in that conveyance, or in the proceedings to consummate title thereon; and that, therefore, whatever may be the rights of the defendants, the plaintiffs are not in a condition to institute or maintain this suit for want of the requisite interest in the subject-matter involved.

They further contend that the purchase by the defendants of Henry Clarke's interest in the mode appearing by the proofs, vested in them the title of Henry Clarke to the lands on the west side of the stream to the center thereof; and the assignment by William Utter to them of the Hilliard lease vested in them the title of Hilliard during the continuance of the lease to the lands on the east side of the stream, to the center thereof.

These are the questions to be considered. In examining them, it will be convenient to inquire: First, what were the rights of William Utter in the premises in question prior to the foreclosure of the Johnson mortgage and independent of that mortgage? Second, what rights became vested by the mortgage and the foreclosure thereof in William Johnson and through him in the plaintiffs?

Let us see what has been the cause of adjudication on this subject.

The question to be determined in this case is a difficult one, and the cases are by no means uniform, and perhaps no well-defined rule can be extracted from them.

The first question to be determined is, whether the permission to build the dam and abut the same upon the lands of Henry Clarke was a mere *license*, or an interest in lands. The distinction between the two is perhaps as accurately defined in the leading case of *Mumford* v. *Whitney* (15 Wend., 380) as in any other. A license is an authority to enter upon the lands of another and do some act or series of acts thereon, without passing or intending to pass an estate therein. When they partake of the latter character they lose the character of a mere license and then become an interest in lands.

The former may be by parol; are valid, though not in writing; are usually founded in personal confidence, and not assignable; are generally revocable, but sometimes irrevocable; confer complete protection until revoked; are always revocable when executory, and generally irrevocable when executed. The latter are required by the statute of frauds to be in writing, and are void if not so, inasmuch as they pass or confer an estate in the land, and it is against the policy of the law, as well as against the explicit directions of the statute, that they should have force and validity unless manifested in writing. (See also *Wolfe* v. *Frost*, 4 Sandf. Ch., 72.)

I think it also sufficiently clear that permission to build a dam across a stream of water and abut the same upon the lands of another, when designed not merely for temporary but permanent use with a view to collect and divert water for milling and manufacturing purposes, is, under the decisions of our courts, of a nature which passes an interest in lands, and if it is to possess the characteristics of a *right* instead of a mere *license*, must, in order to confer *such right* and to operate as a complete protection to the licensee or grantee, be in writing. Such was the express decision in *Mumford* v. *Whitney*, *supra*. (See also *Thompson* v. *Gregory*, 4 Johns., 81; *Jamieson* v. *Milleman*, 3 Duer, 255; *Jackson* v. *Babcock*, 4 Johns., 418; *Miller* v. *Auburn & Syracuse R. R. Co.*, 6 Hill, 61; *Brown* v. *Woodworth*, 5 Barb., 550; *Pitkin* v. *Long Island R. R. Co.*, 2 Barb. Ch., 221.)

Notwithstanding the weight of adjudication in regard to the nature of such an interest and the necessity of a writing or a deed to give it complete efficacy, there are many cases which hold that the licensee who relies in good faith upon the license given, and acts upon it and makes permanent improvements, is not altogether remediless. Thus in *Wood* v. *Lake* (Sayer, 3), a parol agreement to stack coals on part of a close for seven years with the use of that part of the close, was held good. So in *Mumford* v. *Whitney* (15 Wend., 387), it is said that a license to enter upon land, while it remains executory, may be revoked at pleasure; but when executed, it in general can only be revoked by placing the

other party in the same situation in which he stood before he entered upon its execution.

In *Winter* v. *Brockwell* (8 East, 308), where the defendant, with the consent and approbation of the plaintiff, placed a sky-light over an open area above the plaintiff's window, by means of which light and air were prevented from entering, and the plaintiff, after it was done, gave notice to have it removed, Lord ELLENBOROUGH held, on the trial, *that the license having been acted on, and expense incurred, it could not be recalled without offering to pay all the expenses incurred under it.* The defendant had a verdict, and a new trial was denied.

In *Kern* v. *Rurick* (14 Serg. & Rawle, 267), the defendant had given the plaintiff permission to divert a stream of water and to pass the same over defendant's land for the purpose of propelling a mill which the plaintiff thereafter built on his own land. The court held the license irrevocable after the expense had been incurred; that a license may become an agreement or valuable consideration, as, when the grantee has made improvements, or invested capital in consequence of it, he has become a purchaser for a valuable consideration; and that equity would decree the specific performance of such an agreement; that a right under a license was co-extensive with the object intended, and if it was designed to be permanent in character and a perpetual exclusion of the owners rights, it was of unlimited duration.

In *Wetmore* v. *White* (2 Caines' Cases in Error) an executed parol contract for the damming and diversion of water to one side of a stream, the opposite shores of which were owned by different owners, was upheld and enforced as a contract for its perpetual diversion.

In *Pierrepont* v. *Barnard* (2 Seld., 279), it was held by this court that a parol license to cut and carry away standing timber, when fully executed before revocation, constitutes a complete protection to the licensee; and that, notwithstanding there was an agreement between the parties in a written contract for the sale of the lands, the purchaser should

not cut any timber without the consent or approbation of the vendor in writing.

It is not to be denied that, determining the case by the rules of the common law, there are a large number of apparently well-considered cases in opposition to those here referred to. They are almost all of them cited in the leading cases of *Mumford* v. *Whitney* and *Pierrepont* v. *Barnard*, *supra*. They are quite numerous, and many of them I think irreconcilable with the doctrine contained in most of the foregoing cases. They are so fully discussed in the two cases above cited that I deem it unnecessary to repeat them here, otherwise than by a reference to their titles. (See *Cook* v. *Stearns*, 11 Mass., 533; *Green* v. *Armstrong*, 1 Denio, 550; *Moore* v. *Wait*, 3 Wend., 104; *Fentinam* v. *Smith*, 4 East, 108; *Hewlins* v. *Shippam*, 5 Barn. & Cress., 210; *Bryan* v. *Whistler*, 8 id., 288; *Thomsom* v. *Gregory*, 4 Johns., 81; *Jackson* v. *Buel*, 9 id., 298.)

In this apparently irreconcilable conflict of authority in the courts of the common law, it is proper to consider whether a more liberal rule prevails in equity. We are determining this case in a court and in an action of the latter description, and it is fit that we should examine the cause of adjudication in tribunals of that description, and see if there be anything there to relax the unbending rigor of the common law.

In *Miller* v. *The Auburn and Syracuse Railroad Company* (6 Hill, 63), already quoted, Justice COWEN observes: "How far the cases mentioned may accord with the rule of equity which sometimes enforces parol conveyances made on valuable consideration and executed by possession, it is not necessary to inquire."

In *Pierrepont* v. *Barnard* (2 Seld., 304), Justice GRIDLEY observes: "But it will be asked, is there no remedy for a party who has proceeded under a parol license and expended his money and labor on the timber in manufacturing it into lumber? I answer, there is no remedy at law, any more than there is in a case where a man purchases a hundred acres of land by contract, and expends a thousand dollars in improvements upon it, and is sued in ejectment by the owner of the

legal estate. *In both cases he may file his bill in chancery for relief, when that court will see equal and exact justice done to both parties.* At law there is no remedy, and the defendant, before he can have any relief, must seek it at the door of another tribunal."

In *Kerr* v. *Rurick* (14 Serg. & Rawle, 267), before quoted, Justice GIBSON remarks, in a case very analogous to the present, that *equity would decree the specific performance of such an agreement.*

The leading cases in equity are collected and freely extracted from in Angell on Water-Courses, sections 318 to 325 inclusive. I will only briefly refer to a few of them. The author says the decisions of the courts of equity proceed on the principle, not that the right passes by parol license or agreement, but that wherever one party has executed it by payment of money, taking possession and making valuable improvements, the conscience of the other is bound to carry it into execution, and equity will compel him to do it. (Referring to *Le Fevre* v. *Le Fevre*, 4 Serg. & Rawle, 241; *McKillip* v. *M. I. Cheany*, 4 Watts, 317.)

So when one stood by and saw his water-course diverted, but, instead of preventing it, encouraged the work while it was going on, and afterward brought his action at law, he was restrained by injunction. (2 Eq. Cas. Abr., 523.) So in the case of long possession of a water-course by the plaintiff, the defendant having cut a channel on his own land and set up a sluice so as to divert the stream, a decrée was made for the plaintiff. (*White Church* v. *Hide*, 2 Ark., 391.)

Lord Chancellor COTTENHAM, in *Williams* v. *Earl of Jersey* (1 Craig & Phil. Ch., 97), says, a party may so encourage that which he afterward complains of as a nuisance as to prevent him from complaining of it, and be prevented from doing so by any injunction, and that it was the duty of a party, seeing a nuisance in course of erection, to give notice of his intention to object.

The case of *Wetmore* v. *White* (2 Caines' Cases in Error, 87) has been before referred to. The judgment was unanimous, and the court held that a parol agreement, in part performed,

was not within the statute of frauds. In *Hulme* v. *Sheeve* (3 Green [N. J.] Ch., 16), the use of water-gates by the defendant for four years, with the assent of the complainants, was held to give the right to continue them, so long as confined to their original purpose.

The case of *Rurick* v. *Kerr* (14 Serg. & Rawle, 267), before referred to, is a signal instance of the rule which a court of equity enforces in cases similar to that under consideration. The court, among other things, says: "A right under a license, when not specially restricted, is commensurate with the thing of which the license is an accessory. Permission to use water for a mill, or anything else that was viewed by the parties as a permanent erection, will be of unlimited duration and survive the erection itself, if it should be destroyed or fall into a state of dilapidation, in which case the parties might perhaps be thought to be remitted to their former rights. But having had in view an unlimited enjoyment of the privilege, the grantee has purchased, by the expenditure of money, a right, indefinite in point of duration, which cannot be forfeited by non-user, unless for a period sufficient to raise the presumption of a release."

These views appear to me to be sound, and, if supported by the facts of this case, to have a direct and decisive bearing upon the present controversy. They seem to establish the following propositions:

First. The permission to erect a dam across the Unadilla river, and to abut the same upon the land of the riparian owner, whether it be regarded as a mere license or as conferring an interest in land, may become, under certain circumstances, irrevocable, and ripen into a right, notwithstanding such permission may be by parol. But for what seems to be the weight of authority at the common law, I should have had some doubt whether such permission was not rather a license than an easement—a privilege to employ the land for a particular purpose, rather than an interest in the land itself—revocable, perhaps, in its nature, while executory. And perhaps so, after it was executed, if obviously intended as merely gratuitous and temporary in its operation; but not irrevoca-

ble after it was executed, if originally contemplated to be perpetual, or so reasonably expected to be by the licensee, and if it was followed by substantial erections and permanent improvement, made with the knowledge of the owner of the land and without objection by him, and therefore with his acquiescence and consent.

Second. The same considerations are in substance applicable if the permission amount to an easement or interest in land instead of a mere license to do certain acts upon it. Though such an interest cannot be conferred by parol, and a defense resting upon it may possibly be unavailable at law, yet in equity, if the grant was designed to be unlimited in point of time, permanent in point of interest, to invite large outlays of money and of labor, and such were actually made in good faith, in honest reliance upon the perpetuity of the grant, and with the acquiescence and consent of the owner of the land, he is in equity estopped from violating the rights thus conferred, and it would be a fraud for him to attempt to do so.

Third. The right of the plaintiff to relief depends upon the establishment of these facts. If the license was designed to be of only temporary duration it has probably long since expired. If it was intended to be restricted to the saw-mill and clothing works originally erected and to business of that description, it cannot be enlarged so as to embrace manufactures of an entirely different and essentially permanent character, and the right of the plaintiff in any event to a perpetual injunction depends upon the structures and improvements being permanently devoted to the purposes for which the grant was originally made. When they cease to be thus appropriated, the right ceases, and the privileges revert to the grantor or his successors in the title.

The act of constructing the dam was, when done, justifiable. It was done with the permission of the owners of the land, and was, so far, an executed license. It was done for a manifest purpose, to wit: to procure a head of water and to divert such water from the bed of the stream. It was followed in the same year by the construction of a canal over

lands held by three different owners, with the obvious intent to appropriate the water-power to milling or manufacturing purposes at the terminus of the canal. It was followed, in the same or the next subsequent year, by the construction of the saw-mill and carding and cloth-dressing works, to the operation of which Utter and his successors for twenty-five years devoted the property. The owners on both sides of the stream saw these buildings in the course of construction and these expenditures being made. They must necessarily have been of considerable magnitude. The question is, what effect they had upon the rights of the owners of the land. Could the license be revoked if they saw these expenditures going on, perceived the improvements to be of a permanent character, and could reasonably have anticipated these results at the outset? I am of opinion they could not. It would be in effect giving countenance to fraud. They were bound to object in season, if they had reason to anticipate these results. They had no right to stand silently by and witness large expenditures for permanent improvements, without interposing any objection. If the permission was gratuitous it ought to have been withheld. The making of the expenditures constituted in effect a consideration. It involved the payment of money by the grantor of the plaintiffs, and resulted in harm to him, whether it was or was not a benefit to Clarke.

The effect of the acquiescence of the adjoining owners as an estoppel or as imparting irrevocability to the license, depends, it is true, in part upon the lapse of time, in part upon the amount of expenditures made, and in part upon the permanency of the improvements actually made or reasonably anticipated. No doubt the license could have been revoked, if done before it was executed. Whether it would be to that extent afterward, must depend, I think, upon circumstances. Did the adjoining owners know that a dam was to be erected in its material and mode of construction solid and permanent? Did they see the ditch in course of construction well excavated and continued over adjoining lands to an eligible location for milling or manufacturing works?

Did they observe these works in process of construction, and have reason to infer from their material, their extent, their mode of construction, their location, that they were designed to be permanent? I think we may answer all these questions in the affirmative. If not directly found by the referee, they are reasonably inferable from his report. The contrary of them certainly is not found, and we may make any reasonable intendment in support of the judgment.

These improvements were thus perfected within one year, or at most within two years, after the license was first given. The licensers had reason to anticipate from the first, from the very nature of the license sought, the permanency of the contemplated structures and improvements. If they had not, then they had abundant opportunity within that period plainly and promptly to make their protest against their further prosecution. I think they were bound to do so. It was a fraud not to do so, if they designed any subsequent revocation of the license. If they were silent when they ought to speak, they cannot now be heard when they ought to be silent. Whatever may be the rule at law, I think in such cases equity is competent, and is in the constant practice of administering proper relief.

These considerations derive additional force from the lapse of time. The licenser not only held his peace while these structures were in course of erection, but he never opened his mouth in his lifetime to object to William Utter's proceedings. Clarke died in 1831; he was the friend and connection of Utter; he devised his property to his sons; they made no objection. In the same year they conveyed to Ethan Clarke; he made no objection, at least till 1846, after the plaintiffs had contracted to purchase of Johnson, and then he only objected by granting to the defendant, Francis A. Utter, the exclusive privilege of maintaining the dam, and controlling the water to the west of the center of the stream. There was no notice to the plaintiffs, and no express prohibition to them to continue in the exercise of the privileges theretofore enjoyed. It was no consent to the destruction or injury of the dam, but a provision for its maintenance and for the use of the water by

the defendants. It was in effect a subsequent license to the defendants, inconsistent it may be, to some extent, with that conferred on the plaintiffs, but still subsequent in point of time. Was it intended thereby to destroy the plaintiffs' right? Was it designed to confer on Utter the right to destroy or mutilate the dam?

Assume that the object was to revoke the license and confer the privileges on the defendant, Utter. I am of opinion that Ethan Clarke was not in a situation to do so; that the charac ter of the license given, and the rights intended to be enjoyed under it, the exercise of those rights in accordance with the license given, without objection or interruption, the valuable character of the structures erected, the magnitude of the expenditures incurred, the permanency of the improvements made, the acquiescence of all the parties, constitute in equity a bar to the subversion of the plaintiffs' privileges, and the destruction of their property.

Such was the state of things before the foreclosure of the Johnson mortgage. As the plaintiffs claim under that foreclosure, it remains to be considered whether its effect was to secure a transmission of the rights of William Utter to Johnson, and to the plaintiffs as his grantees.

The defendants insist, as I understand them: first, that in the mortgage, the premises are described only by metes and bounds, without any fit words to pass the appurtenances, and therefore that the foreclosure of that mortgage and the purchase by the mortgagee did not pass the title to the dam and water-privileges, first, because there are no apt words of description under which they would be conveyed; second, because they are not properly appurtenances to the eleven acre lot: and, second, that by reason of the union of title, and of possession of the eleven acre lot, and the four acre lot in the same person, to wit, William Utter, the easement or right of passage across the four acre lot lost its character of an appurtenance, inasmuch as it never exists as a distinct right or interest over a man's own property, and became merged or united with his general ownership over the whole property, and third, that even if the right vested in Johnson

by his purchase at the mortgage sale, it did not pass to the plaintiffs under the quitclaim deed from Johnson to them, or to Babcock, which both failed to describe the premises so as to pass this easement, and was not intended to pass it in point of fact.

1. The general rule is unquestionable, that whatever is necessary to the enjoyment of a grant, or in common use with the subject of a grant, passes with it to the purchaser as an incident or part of the same, without express words. Whether a right of way or other easement is embraced in a deed is always a question of construction of the deed, having reference to its terms and the practical incidents belonging to the grantor of the land at the time of the conveyance. (*Huttemeier* v. *Albro*, 18 N. Y., 48; *Tabor* v. *Bradley*, 18 id., 109; 21 id., 505; *Oakley* v. *Stanley*, 5 Wend., 523.)

The case of *Tabor* v. *Bradley* (18 N. Y., 109) is supposed by the defendants to lay down a different doctrine, but I think otherwise. That case stands on its peculiar circumstances, and if well decided (which I will not discuss, and do not deem it necessary to dispute), should not be intrusted as authority beyond the range of the facts therein mentioned. It was held in that case, that the premises conveyed by metes and bounds did not pass a mill-dam and water-privilege alleged to exist thereon, but it is distinguished in three particulars (one of which is mentioned by Judge PRATT, and two by Judge DENIO) from most cases of this description. First, it contained no evidence that the grantors knew or supposed there existed any such rights or privileges on the premises. Second, the mill-dam and water-privilege according to the fair inference from the evidence, were not *in existence* on the premises at the time of the conveyance, or at least it is doubtful whether they were. Third, the presumption of knowlege in the grantor of the nature, incidents and privileges of this description existing on the premises, arising in ordinary cases, was held not to apply in the particular case which was the grant of wild lands by a company which was the owner of immense tracts of that description.

This does not interfere, I think, with the general doctrine that the grant of land ordinarily conveys not only the land itself but all that is upon it or attached to it, and all which has been connected or enjoyed with it as an incident or appurtenance to its ordinary use. Hence the conveyance of lands would pass a mill and mill-pond and canal upon the same; and the latter would pass the flowage of water and water-privileges enjoyed and used with it and often giving to it its chief value. (4 Kent's Com., 467; *Oakley* v. *Stanley*, 5 Wend., 523; *Burr* v. *Mills*, 21 id., 290; *Le Roy* v. *Platt*, 4 Paige, 77.)

2. I do not think that the fact that William Utter owned simultaneously the four acre and the eleven acre lots which adjoined each other extinguished the easement or right of water passage analogous to a right of way across these lands, so that when the ownership of the two lots became separated and one, that of the four acre lot remained in Utter, and the other, that of the eleven acre lot, passed on the foreclosure of the mortgage to Johnson, that Johnson necessarily lost the right of way or of water passage across the four acre lot.

I admit the general rule that a man cannot ordinarily have an easement or right of way over his own lands (*Huttemeier* v. *Albro*, 18 N. Y., 111; Angell on Water-courses, Sec. 191 to 195), because, having the whole estate in the lands, such right of way as a special and independent right is unnecessary to be maintained, he having a perfect right of way over every part of his own premises. But each case must be judged by its own peculiar circumstances; and if it be quite obvious that the right of way for carriage by land or passage of water was intended to be preserved as a distinct and independent interest, if such be obviously necessary and indispensable for the full enjoyment of the lands conveyed in the most lucrative manner, if such easement has been practically preserved and enjoyed for a long series of years in the same person notwithstanding the unity of title and of possession, then we are, I think, entitled to regard and treat it as an appurtenance or mode of enjoyment which is

designed to be perpetual as long as the necessity for it continues.

Moreover, if we conclude that the conveyance of the eleven acre lot to Johnson passed to him the mill and the factory thereon, and the ditch or canal feeding the same, so far as they were actually located on the eleven acre lot, by the mere force of the ordinary words of conveyance therein, then I think, under the cases already cited, the right to flow water in the canal across the four acre lot passed to Johnson as a natural incident or appurtenance to the useful and long continued enjoyment of the premises embraced in the eleven acre lot. They were strictly rightful and essential incidents to the accustomed use of that property, and are to be maintained, not as conveying any land outside of the boundaries in the deed, but collateral rights and privileges over the land of another, necessary to the profitable enjoyment of the first, confirmed and matured by long usage, and therefore properly concluded to have been within the intention of the parties to pass by a conveyance thereof.

3. The same course of reasoning which has been heretofore employed to justify the conclusion, in a certain aspect of the facts of the case, that Johnson succeeded to all the rights of William Utter, will also, in the same aspect of the facts, justify the conclusion that Henry H. Babcock and the plaintiffs succeeded to the rights of Johnson.

The grounds upon which the defendants' counsel argue otherwise, rest mainly on incidents founded on the facts of the case, as that Babcock purchased by quitclaim deed; that he paid not more than half the value of the premises for milling and manufacturing purposes; that Johnson declined to give any guaranty of the water-rights and privileges; that Babcock had reason to believe the right would be denied and controverted by the Utters, and, therefore, was a bold speculator or prowling assignee.

All these are questions of fact properly addressed to the referee and the court below, but not to us, except in a limited point of view, as having some bearing on the construction to be given to the instruments. The referee has decided against

them, and must be assumed to have found the intentions of the parties to have corresponded with the theory which the plaintiffs put forth, and we must address ourselves to the task of giving a construction to these instruments, assuming these inferences of the referee to be correct.

The case then appears to occupy this position:

The mortgage described the premises by metes and bounds but made no allusion to mills, canal or water-power, on its face. There can be no doubt that it would carry with it the mills and such part of the canal as were within its boundaries, together with the water-power and privileges which properly pertain to the mills and that part of the canal. This would embrace the flow of so much water as was accustomed to flow and to be used on the premises conveyed.

It follows that the source of supply could not be lawfully interfered with, for that would interrupt and curtail the usual quantity. Hence, as the water was not and could not be derived from any other source, the mortgagee and purchaser was entitled, as a part of his purchase, to be protected in the rights and privileges theretofore enjoyed, and, among them, in the full enjoyment of the means essential to procure the supply of water needed for the operation of the mills. This right was, I think, as absolute as if the water which flows through this artificial canal had come between the banks of a natural stream. In the latter case it will not be pretended that the riparian proprietor above could divert the water, or interfere with its accustomed flow to the mills below. This course of reasoning tends to show that there was no right to divert the water. Perhaps it is unnecessary to inquire whether this also passed the right to the property in the dam or the right of reparation thereof, although I think it did as an appurtenant or incident to the principal thing conveyed, and as one means, and the chief means, for procuring the quantity of water which could not otherwise be supplied.

If I am correct in these propositions, then the effect of the foreclosure was to transmit to Johnson, and through him to the plaintiffs, not only the land embraced within the boundaries of the deed and all the structures and improvements

upon it, but all the rights and privileges incident and appurtenant to it. If so, then none of them remained in William Utter, and none of them passed by the attempted assignment of the Hilliard lease by William Utter, to his sons Francis A. Utter and Jacob S. Utter, in March, 1839.

Hence, the plaintiffs have a perfect title, and the defendant's acts were without authority of law and a direct invasion of the plaintiffs' rights.

I think the judgment should be affirmed with costs.

Judgment reversed.

ALEXANDER KING v. ABIJAH FITCH.

In an action to recover back property which had been fraudulently obtained upon credit, it is not necessary to aver that the plaintiff tendered back the notes received upon the purchase.

The fact of tendering back the notes received upon the purchase only goes to show that the plaintiff had not affirmed the contract after he had knowledge of the fraud.

It is unnecessary that the plaintiff cancel the notes of the defendant — it will be sufficient if he produce them on the trial.

The object of a demand of property is to put it in the power of the party to comply therewith without exposing himself to other parties.

If the demand be not sufficiently specific for such purpose, yet if the defendant does not object to the sufficiency of the demand, and refuses to deliver up the property for improper reasons, a further demand will be unnecessary.

If, in such case, the plaintiff has received the notes of other persons, or other property, he must restore or offer to restore them before suit brought.

APPEAL by the defendant from a judgment of the Supreme Court, rendered upon the verdict of a jury. The action was in the nature of trover for the conversion of a quantity of timber, which had been purchased by Thomas Nelson of the firm of A. King & Sons (who had assigned the cause of action to the plaintiff, who was one of that firm), and was based upon the allegation that the purchase was effected by means of false pretenses on the part of Nelson, which prevented the title from passing to the purchaser. The defendant was the assignee of Nelson under a conveyance of his property in trust for his creditors, certain of the creditors being preferred. King & Sons, and Thomas Nelson, were respectively dealers in lumber, the former having for their place of business and residence at Ithaca, and the latter at Auburn. Nelson purchased his lumber for the most part of King & Sons on credit. He thus purchased to the amount of $2,000 in the year 1854, and to the amount of $3,754.59 in 1855, $864.02 of which last was purchased in May of that year, and the residue in the autumn. The recovery was confined to the parcels purchased in the autumn of 1855, amounting to $2,600 including interest, it appearing that the

purchases of 1854, with an exception to be mentioned, had been paid for, and that a payment of $400 had been made on account of the purchase in May, 1855. A parcel of the lumber purchased in 1854 had been sunk in the Cayuga lake on its way to the purchaser. It was recovered in July, in the following year. It having been received by Nelson, he gave King & Sons his note for it, which had not been paid. Notes had been given for all the other lumber purchased. The complaint claimed to recover for lumber purchased by Nelson in each of the years 1853, 1854 and 1855.

The evidence on the trial, which was had at the Tompkins Circuit before Judge MASON, related mainly to the alleged fraudulent representations, which were claimed to be to the effect that he had a large real estate only slightly incumbered, that he was not otherwise indebted, and especially, that he had no accommodation at the banks in Auburn, and that he was abundantly responsible. These representations were sworn to have been made at various times on occasions of negotiations for the lumber in 1853, 1854, and 1855. The defendant's evidence was directed to showing that the representations, so far as any were actually made, were true, and that Nelson, whenever requested, had made a fair representation of his circumstances. Nelson's assignment to the defendant was executed the 25th March, 1856, and by it paper indorsed for his accommodation and discounted at the banks at Auburn, to a large amount, and much of which had been running during the years 1854 and 1855, was preferred to the general creditors, among whom were Messrs. King & Sons. It was proved that Nelson's real estate, which was extensive, was heavily mortgaged. It was shown that the plaintiff, on the 7th day of April, 1856, demanded of the defendant and Nelson, all the lumber which the latter had purchased of King & Sons, which was then piled indiscriminately in Nelson's lumber yard, on the ground that these purchases were made by means of frandulent pretenses, and the plaintiff, at the time of the demand, produced and offered to give up the notes which had been given for it. The defendant claimed to hold the timber as assignee, and

said he could not give it up, but would hold on to the proceeds until he ascertained who was the true owner. This action was commenced shortly afterward.

A prominent position insisted upon in the defense, on the trial, and upon this appeal, was, that the plaintiff had ratified the sale prior to the demand of the timber of the defendant, and that the evidence of this was so strong as not to leave any question for the jury. It was proved by Thomas Nelson, by Robert Nelson, his son, by the defendant as a witness on his own behalf, and by one Eddy, an employee of T. Nelson, that the plaintiff came to Auburn on the first day of April, about a week preceding the demand, and was informed of the assignment, and looked over the record of it, and knew that Nelson's indorsers were preferred before him; that he looked over the assigned lumber in the defendant's hands, and was furnished by Robert Nelson with a statement of his father's indebtedness, and of the amount of the accommodation-paper preferred in the assignment, which the defendant said he wanted to show his sons, the other partners of King & Co.; that he complained that the indebtedness was larger than he had supposed; and claimed that he ought to have been preferred for at least a part of his debt; that he did not reproach Nelson for what he had done, but admitted that he had probably done the best he could do; that he proposed, in the presence of the defendant and Robert Nelson, that the latter should purchase the assigned lumber of the defendant as assignee, which Robert declined to do. According to the testimony of Robert Nelson and the defendant, the plaintiff on that occasion requested the latter to go on as assignee, and sell the lumber to the best advantage, and said that was his only chance of being paid.

The plaintiff, who was a witness on his own behalf, said on his direct examination that the first time he was at Auburn, "he looked the thing over and found how things stood." He was cross-examined on this feature of the case by the defendant's counsel, prior to the above-mentioned testimony of the defendant being given, and stated that he did not

recollect of telling the defendant to sell the lumber, or advise Robert Nelson to purchase it; and that he did complain of being deceived by the Nelsons, when he sold the lumber, by their representations that T. Nelson did not owe any debts except to his firm.

As to the plaintiff having full information as to the alleged fraud during his visit to Auburn on the first of April, the evidence was, that he did not then examine the real estate, but that as to a part of it he did so, when he subsequently came there to make the demand of the defendant; that on this last occasion he asked for and received a further statement of Nelson's assets and liabilities, in which the incumbrances on the real estate were set down at $5,500, and that its estimated value beyond the incumbrances was stated at $4,700.

It was shown that on this last occasion the plaintiff and one of his sons, who came with him, spent the greater part of the forenoon, prior to the demand of the lumber, in obtaining statements of indebtedness, and was then told by the defendant that the bank notes had been renewed from time to time for the last two or three years. Robert Nelson did subsequently purchase all the assigned lumber of the defendant as assignee.

At the close of the plaintiff's case, the defendant moved for a nonsuit on various grounds, which, so far as they are material, are noticed in the opinion; and, at the conclusion of the evidence, a like motion was made, grounded principally upon the position that the plaintiff, on the occasion of his first visit to Auburn, in April, 1856, had ratified the sales to Nelson, or had so conducted himself that he could not afterward disaffirm them, and claim that the title did not vest in T. Nelson; but the motion was denied. Upon the subject of such supposed ratification, the judge charged as follows: That when a party has been defrauded of his property under a pretended sale, he may, if he so elect, as soon as he discovers that fraud has been practiced upon him, rescind the sale and recover back the property; but that, in order to avoid such a sale, the party rescinding must restore

what he received and all he received, etc. That in applying this rule to the present case, the plaintiff cannot recover for the lumber sold prior to the fall of 1855, because all such prior purchases had been paid for in whole or in part, and as to the portion partly paid for, he had not offered to return the money paid. He further stated as follows: That if the firm of A. King & Sons did part with the property through the fraud of Nelson, the plaintiff is entitled to recover the value of the lumber, bought in the fall of 1855, in the hands of the assignees when demanded, provided the plaintiff has not debarred himself of his action after he became aware of the facts in the case and the condition of Nelson's affairs. While the law permits the seller to rescind the sale, it also requires that he shall do so at the first reasonable and practicable moment after he discovers the fraud. He must act promptly and without delay. If he affirm the contract after he has a knowledge of the fraud, even for a moment, he cannot afterward rescind. He also stated that it was a question for the jury whether the plaintiff had so conducted himself on the occasion of his first visit to Auburn after the assignment, as to deprive himself of this action by an express or implied acquiescence in the sale after being fully informed of the facts of the case.

The defendant excepted to the several points in the charge adverse to him, some others of which are noticed in the opinion, and to several rulings on the trial, including the denial of the several motions for a nonsuit and for special instructions. The verdict was for the plaintiff for $2,600. After an affirmance by the General Term, the defendant brought this appeal.

John K. Porter, for the appellant.

George D. Beers, for the respondent.

DENIO, Ch. J. The point most earnestly insisted on by the defendant's counsel is, that the plaintiff, by his conduct when at Auburn on the 1st day of April, 1856, ratified the sale of the lumber to Nelson, and thereby precluded himself

from claiming that it was void on account of fraud; no controversy exists as to the state of the law upon the effect of a ratification of a sale induced by fraudulent representations. The vendor may affirm it notwithstanding its original defective character, and pursue his remedy for the purchase price, or he may treat the sale as void, and claim the property as owner; but in the latter case he must act promptly as soon as he has discovered the fraud. While he continues under the influence of the fraudulent representations, his acts or declarations will not prejudice him, but will be considered as of the same character as his original assent, by means of which the property passed into the purchaser's hands. The judge charged in accordance with these principles, and it is not claimed that there was any error in the manner in which the law was laid down, provided the jury had any office to perform in respect to the question. But it is argued that the alleged acts of ratification were of such a character, and that they were so conclusively established, that no question of facts hould have been left to the jury. There is no dispute upon the evidence, but that the plaintiff when he first came to Auburn, after the assignment, and was made acquainted with it, and with the fact that Nelson's accomodation indorsers were preferred before him, spoke of the affair to the defendant, and to Nelson in the defendant's presence as one by which he was concluded, nor but that he then wholly omitted to assert any claim to the lumber based upon the invalidity of the sale, or on any defect in Nelson's title. The testimony of the defendant and of Thomas Nelson was positive to that effect, and it was corroborated by evidence of the conversation of the plaintiff with several other persons on the same day. The plaintiff then knew that the defendant was proceeding to execute the trust contained in the assignment, as though that instrument had passed to the defendant the title to the property which he claims to recover in this action. The plaintiff's testimony as a witness on his own behalf does not contradict the essential points of that given on behalf of the defendant upon this branch of the case. He swore that he did not recollect proposing to Robert Nelson to purchase

lumber of the defendant as assignee, or telling the defendant to sell it, but he did not pretend that he claimed to be still the owner, although he swears that he did complain to the defendant of fraud having been committed in the purchase of it from his firm. After the defendant had given the strong evidence which I have mentioned, the plaintiff was not again called to contradict or explain the declarations of acquiescence attributed to him by the defendant's witnesses.

I think the judge might well have assumed it to be proved by uncontradicted evidence, that the plaintiff on that occasion, in his conversation with the defendant and with others in his presence, assumed that all the lumber passed to the defendant by virtue of the assignment, and that he expected the defendant to execute the trust contained in that instrument. I am, moreover, of opinion that if it were equally clear that the plaintiff had at that time the same full information respecting the fraud which he now sets up, which he had when he came to make the demand of the lumber about a week afterward, the defense of ratification should have been held to be established, and the jury should have been directed to find their verdict for the defendant. But it is not so clear that he had such information. One of the points of the alleged fraudulent representation was that Nelson owned a large real estate which was but slightly incumbered, and another that he was abundantly responsible. The evidence of the fraud would, of course, consist in the falsity of these representations, and could be ascertained only by comparing his property with his indebtedness, and the value of his real estate with the charges upon it. The plaintiff came to Auburn, where the facts could be ascertained, on the first day of April, and returned the following morning. He obtained a certain amount of information, but apparently not sufficient to enable him to act upon the assumption that a fraud vitiating the sale had been committed. He received certain statements concerning Nelson's indebtedness, from Thomas Nelson, his son. He appears to have acquainted himself with the material terms of the assignment, and was informed of the amount of the accommodation paper preferred

by it, but he made no examination of the real estate; and he came away without challenging the sales as fraudulent. He himself says that he complained of fraud, but this is denied by the defendant's witnesses. Nearly a week elapsed when he came again, accompanied by his son, one of the firm who were the vendors of the lumber. They spent the forenoon in examining the real estate of Thomas Nelson and the lumber on hand, and obtaining statements of Nelson's indebtedness, and then the plaintiff for the first time took the ground that Nelson's purchase of the lumber was void on account of the fraudulent representations; and he demanded that such of the lumber as had been purchased by Nelson from his firm should be given up to him. That he acquired some additional information bearing upon the integrity of the alleged representations at his second visit to Auburn is evident.

The fraud upon which the jury rendered their verdict condemning the sale may have been that which related to the value of the real estate beyond the incumbency. The knowledge respecting that value was acquired by an examination of that property on the last occasion. So of the indorsed paper. The additional statements which were furnished on the last visit, showing that indebtedness to have existed substantially as it stood at the time of the assignment, for several years before and during the whole period of the representations, may have been necessary to complete the evidence of fraud which has been found sufficient to avoid the sale. I concede that many of the most important features of the case were disclosed at the first time the plaintiff was at Auburn, but I am not able to say that the plaintiff was at that time fully informed of all the material facts which were subsequently shown to prove the case on the plaintiff's part. Hence I think it was not the duty of the judge to withhold the question from the jury whether the plaintiff, when he omitted to challenge the defendant's title at the first instance, was fully informed of the fraud. I do not say but that, as a juror, I should have held that the information was sufficient to make it his duty to determine finally which course he would pursue before leaving Auburn on the 1st or 2d of April, but

the evidence was not so positive and certain that the judge was entitled to decide the case himself. He therefore committed no error in submitting it to the jury. If the defendant has suffered wrong by the verdict, it was the fault of the jury and not of the judge.

At the commencement of the trial the defendant's counsel moved for a dismissal of the complaint, on the ground that it did not state facts sufficient to constitute a cause of action, and especially that it did not state that the defendant *wrongfully* received the lumber from Nelson. The action was brought for the conversion by the defendant of the personal property of King & Co.; and when it was allowed to have separate names for the different kinds of actions, for the sake of convenience it would have been denominated an action of trover. All that it was necessary to allege in the pleadings was that King & Co., the plaintiff's assignors, were the owners of the lumber, that it had come into the possession of the defendant, and that he had converted it to his own use. All this is plainly set forth in the complaint. In addition to that, the plaintiff saw fit to state his own title, namely the original ownership of King & Co. and the form of a sale to Nelson, which was effected with frauds, and that he wrongfully delivered the property to the defendant; and instead of confining himself to a simple statement of a conversion, he adds an allegation of a denial and refusal. I do not perceive that these statements of evidence modify or in any way impair the material allegations of property in the plaintiff and a conversion by the defendant. It was quite unnecessary to state that the defendant wrongfully received the property. Trover is not based on a wrongful taking, but consists in an unlawful conversion. There was, therefore, no defect in the complaint.

It appeared that Nelson had purchased lumber of King & Co. in the years 1854 and 1855. The plaintiff, when under examination as a witness on his own behalf, was asked by his counsel to state what representations were made by Nelson when he made the purchases of lumber in 1854, and the question was allowed to be answered; and by the answer

certain representations were shown to have been made when Nelson came to make the purchases in that year, and that was an exception to that ruling. It subsequently appeared that all the lumber purchased in 1854 had been paid for; but at a later period of the trial the plaintiff's counsel made the same inquiry of another witness as to representations in 1854, and a similar exception was made to the ruling admitting the question. There was a series of purchases of lumber on credit by Nelson of King & Co., extending through both the years 1854 and 1855, and the plaintiff's effort was to prove that, during the whole time, Nelson was largely indebted and in insolvent circumstances, carrying large accommodations at the banks in Auburn, but constantly represented himself to be essentially free from debt, and a person of competent means; and the proof tended to show such a state of things. Now, although the purchases of 1854 had been paid for, and the whole arrearages of indebtedness were on account of the purchases in the fall of 1855, that does not render the representations made during the earlier dealing wholly immaterial It is not essential, in order to avoid a sale in form, on the ground of fraud, that the fraudulent representations should be made at the very time when the purchases sought to be avoided were made. Where the dealing is continuous or at short intervals, representations made at any time in the course of such dealings may, if the jury so find, be held to influence the seller in respect to the subsequent sales. The evidence in this case was that Nelson, or his agent, was interrogated on each occasion of purchasing lumber of King & Co., and on each of those occasions made similar declarations; and that his other indebtedness and ability to pay in each of the years mentioned were substantially the same. I am of opinion that there was no error in admitting the declarations made on each occasion of purchasing, though the earlier purchases had been paid for. (See *Zabriskie* v. *Smith*, 3 Kern., 322.)

Some of the representations relied on, were made by Robert Nelson, the son of Thomas Nelson, who was his agent in that respect, and was in his employment and had a general

knowledge of his property and affairs. The defendant's counsel objected to these representations on the ground that they were not set out in the complaint, and that they were not made at the time of the purchase of the lumber which had not been paid for, but on the occasion of former purchases. I have already said that it was unnecessary for the complaint to state the representations upon which the purchaser obtained possession of the property. The competency of the declarations of an agent when engaged in making purchases in behalf of his principal was not questioned. They are regarded in the same light as representations made by the principal himself; and it has already been shown that, although they preceded the time of the particular purchase which is drawn in question, they are proper to be submitted to the jury, and it is for them to determine whether, under the circumstances, they have a just influence upon that purchase.

The plaintiff was permitted to testify that he would not have disposed of the lumber to Nelson upon credit, except for the representations which he made as to his circumstances; and there was a similar ruling on taking the testimony of Joseph King, a witness for the plaintiff, who was a partner of the firm of King & Co., and, as such, took part in the sale of lumber to Nelson. The defendant excepted to these several rulings. It is a part of the transaction which a party seeking to avoid a sale of property on account of fraud must establish that the sale was induced by the representations and would not otherwise have been made. The defendant's argument is that this can only be shown by facts and circumstances, to be submitted to the jury, and that the direct testimony of the seller as to their influences upon his mind cannot be received. No doubt the intrinsic facts may be strong enough in a given case to establish the position, and it may also be true in a particular instance, that representations apparently pertinent to induce a sale, were not in truth the persuasive cause, the vendor having wholly relied upon other information, which he supposed correct, but which turned out to be erroneous.

The precise point to be established is the effect upon the mind of the seller produced by the purchaser's wrongful declarations. Where the seller is so situated as to be a competent witness, he can prove with entire certainty how far he was influenced by what the purchaser had said, and how far he yielded to the force of other facts or other information. I see no reason why he should be precluded from speaking. It is not an opinion which he is called upon to give, but the statement of a fact within his personal knowledge. The cases respecting the opinions of witnesses have, therefore, no bearing upon the question. Where the direct testimony of the seller is not obtainable, the facts attending the transaction may be sufficient; but it is because they prove the essential point argumentatively. The jury in such cases infers the principal fact by applying their experience to the ascertainment of the effect which the representations, under the circumstances, would be likely to produce. It would be illogical to exclude the direct testimony of the person whose mind is said to have been influenced by the seller's representations, where he is otherwise competent to testify as a witness. Suppose a sale to have been made by an agent to an insolvent person, would it not be competent for him to swear in an action by his principal that he assented to the sale, and parted with the possession of the property because the purchaser represented that he had a large estate and owed nothing? On the trial of indictments for obtaining money, *or property*, or other valuable things, by false pretenses, it is the constant practice to ask the prosecutor whether he parted with the money, or property, by reason of the statement of the prisoner. It is undoubtedly essential that statements should be of such a character as would naturally lead the owner of property to sell it to the party making them. Whether they actually did have that effect, may be shown by the oath of the owner, provided he be a competent witness.

Nelson was the owner of considerable real estate in 1854 and 1855, and down to the time of his failure. It did not appear when he purchased it. The defendant, when under

examination as a witness in his own behalf, was inquired of by his counsel as to what his real estate cost him, but the question was excluded on the objection of the plaintiff's counsel that it was immaterial. It had no bearing on the case unless the purchases were made during or shortly prior to Nelson's dealing with King & Co. If connected in point of time with these transactions, and before the failure, it might have a bearing upon Nelson's good faith, for if the purchases were made at exorbitant prices, it would tend to show that his means had been absorbed, or his indebtedness had been suddenly created by these purchases. The objection sufficiently intimated to the examining counsel that some further fact was necessary to show the evidence to be pertinent, but nothing to connect it with the representations was offered. Immediately after the exclusion the defendant was permitted to and did testify fully as to the value of his real estate in 1854. This was everything on that subject which had any bearing upon the issue.

The demand which the plaintiff made of the defendant on the delivery of the lumber was more comprehensive than his rights. There was among the lumber in the defendant's possession, not only that purchased in the fall of 1855 but portions of that purchased in the spring of that year, and some of that purchased in 1854. This had all been paid for or partly paid for, and as to that on which a partial payment had been made there was no offer to return the money which had been received. The defendant, however, did not put his refusal on that ground, but claimed to hold the whole under the assignment. There are two answers to the exception arising out of this branch of the case. The possession of Nelson, the sale being void, was wrongful. He might give a good title to a *bona fide* purchaser, but an assignee for the benefit of creditors, does not occupy that position. The possession of this lumber was always, in judgment of law, in the vendors. The defendant was in no better position to defend this action than if he had been the servant of Nelson. (*Ash* v. *Putnam*, 1 Hill, 302; *Cary* v. *Hotailing*, id., 311; *Olmsted* v. *Hotailing*, id., 317. The answer made by the defendant dis-

pensed with a mere discriminating statement of what the plaintiff conceived himself entitled to. The defendant maintained that his title under the assignment enabled him to retain all the lumber which had come to his hands, and he refused to lend any countenance to the claim of the plaintiff.

It was made a point in the prayer for instructions, that the plaintiff had not canceled the notes given for the lumber. He had offered to surrender them when he made the demand, and he produced them in court at the trial. If the defendant had required anything further to be done, it was for him to suggest it.

No point was made on the trial as to the protest of some of the notes by the bank at which they were made payable. The judgment appealed from, should, in my opinion, be affirmed.

INGRAHAM, J. This action was to recover from the defendant damages for the conversion of a quantity of lumber, which it was alleged was fraudulently obtained by Thomas Nelson from A. King & Sons. The plaintiff claims as assignee from the other parties in interest.

The complaint averred fraudulent purchases in the years 1853, 1854 and 1855, the transfer by the other parties in interest to plaintiff on 5th April, 1856, the delivery of the lumber by Nelson, to the defendant, on 1st April, 1856. The demand was dated the 7th April, 1856. Defendant put in a general denial. The alleged fraud consisted of representations as to the condition of the purchaser and that he did not owe anybody else.

Some of the representations were made by the son of Nelson, who made some of the purchases. One lot of lumber purchased in the fall of 1854, was sunk in the lake. For this a note was given by Nelson. All the other lumber purchased prior to 1855 had been paid for.

A large portion of the lumber bought in 1853, 1854 and 1855 was on hand in possession of defendant, all of which had been paid for excepting a part of that purchased in 1855, and the note given for the sunken lumber for $495.33.

When the demand was made of the defendant, the plaintiff demanded the lumber got of him, and tendered back the notes, all excepting the one given for the sunken lumber. The defendant said he held the property as assignee, and could not let the plaintiff have the property.

One of the firm of A. King & Sons, who sold the lumber, on examination by the plaintiff, was asked, "Would you have sold the lumber except upon the strength of the representations?" to which he answered he would not. The defendant excepted to the admission of this question.

A motion was made to dismiss the complaint, because it did not state facts sufficient to constitute a cause of action, and did not aver that the property was wrongfully received by the defendant. The motion was denied, and defendant excepted.

The plaintiff asked for the representations made by Nelson when he purchased in 1854. This was objected to on the ground that he must be confined to representations made at the time of the purchase of the property in controversy, which was overruled and defendant excepted.

The same objection was made as to property which had been paid for at different times, all of which were overruled and exceptions noted.

On the part of the defendant, Nelson was asked as to the cost of his real estate. This was overruled, and defendant excepted.

When the plaintiff rested, the defendant moved for a dismissal of the complaint, on the ground that the demand was for a greater amount than he could recover, because it embraced property which had been paid for; that the demand should have been made immediately upon ascertaining the transfer to defendant; that the plaintiff had affirmed the contract, and because he did not cancel the notes on the trial. This was denied, and defendant excepted. The judge charged the jury, among other things, "that, although the demand of the plaintiff was for all the lumber in the hands of the defendant which had been purchased of A. King & Sons, the plaintiff might still recover the value of the lumber on hand

from the fall sales of 1855. If the demand was for too much it was the duty of the defendant to have offered to restore such as he was entitled to."

He also submitted to the jury, as a question of fact for them, whether what took place upon the occasion of the first visit to Auburn was an acquiescence in the sale after being informed of the facts of the case.

To each of these portions of the charge the defendant excepted. The defendant also requested the judge to charge the jury that the defendant was entitled to a verdict because the plaintiff had not actually canceled the notes which were given for the lumber. This was refused, and the defendant excepted.

The jury rendered a verdict for the plaintiff for $2,600, for which judgment was entered; and the judgment was affirmed by the General Term.

The objection to the sufficiency of the complaint was not well taken. The offense consisted in fraudulently obtaining the property by Nelson. When that was made out, the title remained in their vendors, and it was not necessary for him to show any wrongful act on the part of the defendant in receiving the property. When the plaintiff showed fraud in the purchase, and a demand of the property from the person in possession, he made out a *prima facie* case to entitle him to recover. It is not necessary to inquire whether if the defendant had been a holder for value without notice he would have been protected, because if he was such a holder the onus of proving that fact was on him, and because in this case it appeared that the defendant's claim was merely as assignee under a voluntary assignment for the benefit of creditors, and that nothing was paid by the defendant therefor.

Nor was it necessary to aver that the plaintiff had tendered back what he had received upon the purchase. The facts proved showed that there never had been a valid contract. The whole cause of action rested upon that issue. The subsequent matters which were necessary to be shown on the trial, in regard to the return of what had been received, did

not go to make out a cause of action but to relieve the plaintiff from any supposed affirmance of the sale after he obtained knowledge of the fraud. Such evidence is rather to rebut the presumption which the defendant might claim to exist from the acts of the plaintiff as affirming the contract.

The cause of action is that the title was in the plaintiff's assignors and that no title ever passed to Nelson. Whether the plaintiff had in time disaffirmed the contract, or whether he had done everything necessary to prevent the defendant from claiming that he had waived his right to resume possession of the property, was evidence to be furnished and which would go to make out the cause of action or defense, but not necessarily to be averred in the complaint.

The declarations of Nelson as to his solvency made at the time of purchases prior to 1855 were admitted in evidence against the defendant's objections. These declarations were the inducements to the first sales, and they undoubtedly remained in the remembrance of parties afterward. Nothing had been done by Nelson to correct them, but, on the contrary, when the firm of King & Sons declined making further sales, similar representations were again repeated. I see no ground of objection to the testimony. The evidence show, from the commencement, the intention of impressing upon the minds of the vendors that Nelson owed nobody but them and that there was no danger in giving credit to him.

The inquiry is whether the purchaser made any false statements by which the vendor was deceived and the property obtained from him. Such fraud may be practiced by a continuous course of misrepresentation during a series of transactions and still continued notwithstanding the first purchases were paid for. In fact such payment may be a part of a scheme to gain the confidence of the vendor, and induce him to make further sales and to give larger credit. (*Zabriskie* v. *Smith*, 3 Kern., 322, 332.)

The question was put to the plaintiff whether he would have trusted Nelson but for these representations. The objection was, not to the form of the question as leading, but

to the permitting the vendor to state whether he gave credit on them. This could only be known to himself, and it was a material ingredient in the plaintiff's case. If the vendor may not say whether he gave credit on the strength of the representations, or whether he would have trusted the purchaser without them, it becomes a matter for the jury to guess at without the only positive evidence there can be on the subject. I know it is subject to the criticism that it is the conclusion of a witness, but not justly. The conclusions of a witness are the results of his judgment upon various facts coming to his knowledge, and are properly excluded because the jury can form similar conclusions themselves; but this inquiry is as to the cause of action on the part of the vendor in making the sale, and the inducements which led to it. It is not what he thinks of the acts of others, but what he did himself in consequence of these acts.

Some of the purchases were made by the son Robert in the absence of the father. The representations made by him were offered in evidence and objected to. The whole price to be paid for these purchases had not been paid, and the goods which were the subject of purchase formed part of the property claimed and demanded by the plaintiff.

Robert Nelson must be treated as the agent of the purchaser while acting for him. His representations made at the time of the purchase, if false, would vitiate the contract the same as if made by the purchaser. For this reason the evidence was admissible. It was not necessary to aver in the complaint that the representations were made by the agent and not the principal. That was only a matter of evidence. Indeed, as before stated, no such averments are necessary in the complaint, especially where the action is to recover back the property. Even if the plaintiff chooses to waive the tort and sue on contract, it would be unnecessary to set out such matters in the complaint. This was held in *Roth* v. *Palmer*, 27 Barb., 652, 656. HOGEBOOM, J., says: "I think the plaintiff might properly and preferably have prosecuted simply for goods sold and delivered, and allowed the rest of the transaction to come out as matter of evidence."

It was no more necessary to aver that the representations were made by an agent than by the principal, and in both cases such matters were properly treated as evidence, and not as part of the cause of action.

A question was asked of Nelson as to the cost of his real estate. This was excluded, and the defendant excepted. I am at a loss to see what relevancy this question had to the matters in issue. How he lost his property was immaterial. Whether he had any or not when the representations were made would have been pertinent. The defendant appears to have offered this evidence to explain the insolvency of Nelson. As no such inqniry could properly come before the jury, there was no ground on which this evidence could have been received. Proof that he had lost his property without the least fault would not excuse the representation that he had property after it was expended.

The plaintiff tendered the notes held by him at the trial, but did not cancel them. This was made a ground of motion for nonsuit. The cancelment of the notes was not necessary at the time. It was sufficient to produce them on the trial. Being the notes of the debtor merely, they cease to be of any value the moment it was settled that the contract was void. SELDEN, J., says, in *Nichols* v. *Michael* (23 N. Y., 269–73): "It would be more in consonance with equity to hold it sufficient to produce the notes upon the trial and surrender them to the custody of the court, as in that case the rights of both parties are protected. If the fraud is made out and the contract subverted, the notes are void and will be canceled by the court. If the plaintiff fail to establish the fraud, the notes can be returned to him if the nature of the contract is such that justice requires it." Such I think to be the proper rule in similar cases.

When the plaintiff demanded the lumber of the defendant, he tendered the notes he had received from Nelson and demanded all the lumber. Of this, some parcels had been paid for entirely, and some in part. The defendant asked for a dismissal of the complaint on this ground. It is conceded that, if the action had been against Nelson, the pur-

chaser, no demand would be necessary, but that, inasmuch as the defendant received the property lawfully and without notice of any fraud, a demand was necessary to entitle the plaintiff to maintain the action. If any demand was necessary, it was such a demand as would put it in the power of the defendant to comply without exposing himself to liability to other parties. Had the defendant complied with the plaintiff's demand, and delivered up to the plaintiff all the lumber in his possession that was bought of King & Sons, he would have been liable to the creditors, for whom he was trustee. Personally, he had no knowledge as to which of the parcels of lumber was paid for and which were not, while the plaintiff had such knowledge; and I cannot think, with the learned judge who delivered the opinion below, that we should presume, without proof, that the defendant was so informed by Nelson, of whom he obtained the lumber. The whole case shows the defendant to have been lawfully and innocently in the possession of the property, and if the plaintiff conceived he had a claim on any part of it, fair dealing required that he should designate what parcels of lumber he claimed to have redelivered to himself. If he had demanded all the assigned property because one parcel purchased by Nelson had not been paid for, no one would for a moment suppose, either that the defendant was bound to comply with that demand, or that the plaintiff had done what the law requires him to do to entitle him to a right of action. I can see no difference where he demands four or five different parcels, sold at different times, because one parcel had not been paid for. If the defendant, in answer to this demand, had objected on the ground that he did not know which part was not paid for, and requested the plaintiff to specify what he was entitled to, I think the demand would not have been sufficient. But the defendant put his refusal on an entirely different ground, showing his determination not to deliver up any of the property, but to await the result of the litigation. He said "he could not deliver up the lumber, that he was able to pay for it, and should hold on to it or the avails of it until

he know who was the right owner." This rendered any further demand unnecessary. It was a refusal to deliver any of it, not based on any insufficiency of the demand, but an absolute denial of the plaintiff's right to it, and a refusal to deliver any to him. Another question is as to the sufficiency of the tender to warrant the recovery.

It is now well settled where the creditor held nothing but the purchaser's notes for the goods purchased, it is not necessary to tender such notes before action, but that it is sufficient to produce them on the trial to be canceled. *Nichols* v. *Michael*, *supra*. And it is equally well settled if he has received the notes of other persons or other property on account of the purchase he must restore or offer to restore the same before suit. This was so stated in *Nichols* v. *Michael*, as the general rule. "Where one party to a contract elects to rescind it for fraud, it is an indispensable preliminary that he surrender all that he has received from the other party upon the contract. BEARDSLEY, J., in *Mason* v. *Bond* (1 Denio, 72–74), says: "The party who would disaffirm a contract must return whatever he has received upon it. He cannot hold on to such part of the contract as may be desirable on his part and avoid the residue, but must rescind *in toto* if at all." (*Baker* v. *Robbins*, 2 Denio, 139; *Fisher* v. *Conant*, 3 E. D. Smith, 199.) This rule was recognized by the judge upon the trial. He told the jury, "In order to avoid such sale the party rescinding must restore what he has received, and all he has received." This was all the defendant had a right to claim. No part of the lumber purchased in the fall of 1855 had been paid for. The vendor had received nothing except the notes of the purchaser, and these were produced on the trial. In regard to this portion there was a good cause of action made out if the contract was fraudulent, and the judge therefore rightly refused to dismiss the complaint on this ground. As he instructed the jury that the plaintiff could not recover for any other sales except those in the fall of 1855, it was unnecessary to give the jury any further instructions in regard to the money paid on former purchases. The remaining question is as to the

propriety of submitting to the jury whether the plaintiff had not affirmed the contract on his first visit to Auburn. He had told the jury that the seller, if he rescinds the contract, must do so the first reasonable and practicable moment after he discovers the fraud. If he affirms the contract after he has a knowledge of the fraud, even for a moment, he cannot rescind, and he submitted to the jury whether what he did at Auburn was such an affirmance.

It is not by any means clear from the evidence that the plaintiff, when he went to Auburn, had full knowledge of the circumstances attending the alleged fraud; and whether he had or not was, I think properly, submitted to the jury. It does not appear that the plaintiff had any knowledge when the debts were created or what debts were owing at the time the representations were made. On various points connected with this part of the case there was uncertainty calling for the finding of the jury.

A point is made as to the amount of damages. That was a question of fact, which if erroneously found should have been corrected in the court below.

The judgment should be affirmed.

Judgment affirmed.

JOHN GANSON and others, Respondents, v. THE CITY OF BUFFALO, Appellant.

When by law it is made the duty of a municipal corporation to pay to the owners of lands appropriated for public purposes, the amount due for the same, within one year after the same shall be ascertained on the report of commissioners appointed for that purpose, an action will lie against such corporation for such amount after the same becomes due and payable.

It seems, that if the fund out of which such amount to be paid, is to be raised by an assessment to be made by the corporation for that purpose, and the corporation neglect or refuse to make such assessment, that *mandamus* would be the proper remedy.

Where by the charter, the sums awarded for damages are not declared to be a debt against the city, or when it is not made the duty of the city to pay the same, the only obligation resting upon the corporation is to put the necessary machinery in motion according to the requirements of the statute.

THIS action is brought to recover the amount of an award made by commissioners of assessments to the plaintiff's testator, for a piece of land taken and appropriated by the defendants for the purposes of a ship-canal. The action was tried in the Superior Court of Buffalo, by the court without a jury, and which found the following facts: That on the 20th of April, 1857, the common council of the city of Buffalo adopted a resolution declaring its intention to take and appropriate the land necessary to lay out a ship-canal from Buffalo creek to Lake Erie, and for that purpose to take certain lands described in said resolution. That for that purpose certain proceedings were afterward had under the charter of said city for the taking of such land. That on the 31st day of July, 1857, the commissioners appointed for that purpose made and filed with the city clerk of said city their report, in and by which they awarded to the testator of the plaintiffs in this action for his interest in the land described in the above-mentioned resolution, the sum of $9,000, which report was confirmed by said common council on the 7th day of December, 1857. That the proceedings had to take the said land are all contained in the papers read in evidence on the part of the plaintiffs, and with the exception of the order of the said Superior Court, made November

20, 1862, and the affidavit of Quartus Graves, made on the 24th day of July, 1862, are all attached together, and are now on file in the office of the city clerk as the record of such proceedings. That at the time of the taking of such proceedings the plaintiffs' testator was seized in fee of a part of the land described in said resolution of the common council, of April 20, 1857, and the said award to the plaintiff of $9,000 was made to him as a compensation for his interest in the said land. That the said common council has never made, or directed to be made, an assessment to pay the compensation in and by the said report awarded to the plaintiffs' testator and to the other persons mentioned therein, and that in fact no assessment has ever been made to pay such awards or compensation or either of them or any part thereof. That the proceedings so as aforesaid had for taking and appropriating the said land, to lay out said ship-canal, were not had upon the application of a majority of the property holders resident of the city of Buffalo and liable to be taxed or assessed for the construction of said canal, and that no petition or application whatever has ever been presented to said common council asking for or consenting to the construction of said ship-canal or the taking and appropriating of the land necessary to lay out the same. That since the confirmation of the said report the said defendant has done nothing toward the construction of the said ship-canal, and has never entered upon the lands mentioned and described in said resolution of April 20, 1857, or any part thereof, for the purpose of constructing said canal or for any purpose whatever.

Upon the foregoing facts, the said court found and decided as matter of law, that the plaintiffs' testator recover from the defendant the sum of $11,965.89. Judgment was thereupon given for that sum, and the same was affirmed at General Term, and the defendant appeals to this court.

DAVIES, J. It is insisted on the part of the defendant that the order amending the original order for the appointment of the commissioners was improperly admitted in evidence. The original order named *Joseph* G. Hoyt as one of

the commissioners. Under that order *James* G. Hoyt took the oath of office prescribed for the commissioners, and acted as such, and made and signed the report, which was confirmed. It is clear that he was the person intended, and who acted, and who was, in fact, the person appointed. There is no evidence in the case that there was any such person as Joseph G. Hoyt, and, it appearing to the court who made the order appointing the commissioners, that the writing of the word *Joseph* in the place of *James*, was a clerical error made by the clerk thereof, and that James G. Hoyt was the person actually appointed, it was competent for the court to amend the order in accordance with the facts. Such order had relation back to the original order, and made that conform to the truth of the matter. The court did not, therefore, err in admitting the order to amend the original order to be read in evidence, and, the original order being thus in fact amended, there was no error in the admission of the report of the commissioners, from which it appeared that the same was made by the persons named in the order of appointment as amended. The fact is found by the court, that the commissioners appointed by the court made and filed their report. If it was necessary to resort to the evidence, it is apparent from it that the facts proven abundantly sustain this finding without any aid from the order of amendment. As already observed, it was competent for the court to amend the proceedings to correct clerical errors. But if this amendment was not made, I am unable to see any reason why the report should have been excluded.

The first, second and third grounds of nonsuit urged in the part below were disposed of by this court, in the case of *Warren* v. *The City of Buffalo*, decided at the June Term, 1861. That was an action to recover an amount made and confirmed by these defendants for a piece of land taken under their charter for a public street. In the opinion in that case it was said that the compensation due to the owners was ascertained by the report of commissioners, and the report was duly confirmed. Nothing remained to be done,

except to make that compensation in money, and this the charter required the common council to make within one year after the amount was ascertained. No doubt that time was given for the purpose of enabling the city government to collect the money by local assessment on the persons or property benefited by the improvement; but the right to proceed and make this collection, or the neglect to exercise it, did not discharge the duty of paying the owners of the land, or extend the time for making such payment. The charter, in the seventeenth section of the eighth title, provides that the amount of compensation due to the landowners shall be legally assessed, but the eighteenth section declares, in effect, that, as between such owners and the city, the compensation shall be a general debt or charge. This is the effect, because the money is payable peremptorily within the time specified, and out of no particular fund.

The second ground of nonsuit urged was that the plaintiffs' remedy was by a mandamus to compel the common council of the defendant to proceed and make the contemplated assessment, and out of the fund thus received to pay and discharge the amount made to the testator. A like ground was taken in the case of *Warren* (*supra*), and it was then thus answered by this court: "It has been also said that the remedy of the plaintiffs is by mandamus, and not by suit. Undoubtedly if the sum in controversy was payable only out of the local assessment fund, a mandamus would lie to compel that assessment to be made, and an action probably would not lie until the money should be collected on the warrant. But the plaintiffs have nothing to do with the local tax. The duty owing to them is simply the payment of a sum of money, and the action of debt was always the appropriate remedy for the enforcement of such a duty."

It is urged by the respondents' counsel, that there is no proof in the record or otherwise, that one of the city assessors was appointed one of the commissioners, in accordance with the directions of the city charter, and again he urges that the provision of the charter requiring the appointment of one of the city assessors on the commission is unconstitutional. In

support of this latter position, he argues, that the Constitution provides that the compensation to be paid for land taken for public use shall be ascertained by a jury or by three commissioners appointed by a court of record. That it was intended to give parties the right to go before an unbiased court and submit their objections to any person proposed, and to secure the appointment of fair and disinterested appraisers. That the legislature has no right, therefore, to direct that any particular individual shall be appointed, and thus usurp the powers given to the court. In this view of the constitutional provision, the counsel for the respondents is undoubtedly correct. The legislature clearly had no power to say who, or what class of persons, should be appointed commissioners. In the matter of the opening of the Eleventh avenue, Judge EDWARDS, at Special Term, in 1852, held that this provision superseded the requirements of the act of 1839, which directed the court to appoint one commissioner on the nomination of the common council of New York, and one on the nomination of the parties, whose property was to be taken, and the third to be selected by the court; that the Constitution vested in the court, absolutely and without control, the appointment of the commissioners, and that the court had full power to select such commissioners as in its judgment were most fit, without reference to the nominations of the common council, or the parties in interest. Such had been the ruling of the court in other cases, and that is regarded as the settled practice in the appointment of commissioners in the first judicial district. (Davies' Laws, p. 1244.) It may be conceded, therefore, that the provision in the defendant's charter requiring the court to appoint one of the city assessors as one of the commissioners, is repugnant to the Constitution, and, therefore, void and of no obligatory force upon the court; yet still it is not perceived how this objection can be availed of, or is at all appropriate, if the position of the counsel is true, that there is no proof in the record or otherwise that one of the city assessors was appointed one of the commissioners. If the provision of the

charter requiring one of the assessors to be appointed was unconstitutional and void, surely the proceedings are not invalidated by the omission to prove that such illegal and void appointment was made. The averment in the complaint that one of the commissioners was a member of the board of assessors, was denied by the answer, and no proof was offered to sustain the averment, and there was no finding on the subject. But if the averment is to be taken as a fact, it is not perceived how it renders the appointment of this particular commissioner invalid. There is no prohibition in the Constitution against the appointment of one of the city assessors; and, upon the argument of the defendant's counsel, sustained by abundant authority, it is manifest that the discretion of the court as to who it should appoint commissioners could only be restrained or qualified by a constitutional limitation. It follows, therefore, if the court in its discretion thought proper to appoint one of the city assessors a commissioner, it would have been perfectly legal and proper so to have done. By the charter of the defendant as it existed at the time this award was made and confirmed, it was made the duty of the defendant absolutely to pay the same within one year after the amount was ascertained. This ascertainment could only be definitely determined when the report of the commissioners should be confirmed. The amount, then, was to be paid within one year from the confirmation of the report. A similar provision exists in the laws relating to the taking of property for public use in the city of New York. There the functions of ascertaining the amount of compensation to be made to the respective owners of the lands taken, and the assessment of the total amount so ascertained, together with the costs and expenses of the proceedings, are united in one set of commissioners; and they as well make the awards as make and impose the assessments. Upon the confirmation of their report the awards are ascertained and a fund provided for their payment. The statute also declares that the corporation of that city shall pay, within four calendar months after the confirmation of the report, the amount of such awards respect-

ively, and in case of neglect shall be liable in an action to pay the same, with lawful interest from the time of such demand, with costs of suit. It has never been questioned there that such liability was absolute upon the corporation at the expiration of the four months from the confirmation of the commissioners' report, and that it was no answer to the demand or to the action that the assessment made had not been collected.

The liability of these defendants, therefore, is clearly the same as that of the corporation of the city of New York, and is absolute, after the expiration of the time respectively specified for the payment of the awards. And this case is clearly distinguishable from the case of *McCullough* v. *The City of Brooklyn* (23 Wend., 458), and *Gerald* v. *Same*, decided in this court at June Term, 1863. Both these cases were actions to recover awards made for lands taken for public use, and the charter of the defendants required an assessment to be made for the payment of the awards. But the sums awarded for damages were not declared to be debts against the city, nor was it made the duty of the corporation to pay the money. It was held in those cases that the only duty or obligation resting upon that corporation was that of putting the necessary machinery in motion according to the requirements of the statute. It was said that if the common council had neglected that duty, or had been wanting in diligence, an action on the case might lie in favor of any one who, like the plaintiff, would be entitled to the money when collected. But it was suggested that a *mandamus* would be a more appropriate remedy. By an amendment made to the defendant's charter in 1859, the moneys payable by the defendant for awards of lands taken, instead of being payable within one year after the *ascertainment* of the amount thereof, were thereafter payable within one year after the assessments to be made for the payment thereof. The right of the plaintiffs' testator to this money and to compel its payment by the defendant was vested and complete at the expiration of a year from the ascertainment of the amount. The section of the defendant's charter was

not repealed, and therefore the reasoning of CARR, J., in *Butler* v. *Palmer* (1 Hill, 324), is inapplicable in this instance. It may well be held that the amendment of 1859 applied only to awards made after the passage of that act. It did not in terms apply to those made and ascertained previous to its passage, and therefore should not have that effect. An act of the legislature, as a general rule, is to have no retrospective operation, and BLACKSTONE, in his commentaries, treats it as a just principle that all laws are to commence *in futuro* and operate prospectively. (1 Bl. Com., 44.)

In *Dart* v. *Van Vleck* (7 Johns., 477), it was held, after much deliberation and an extended discussion, that an act of the legislature is not to be construed to operate *retrospectively*, so as to take away a vested right, and that it was a principle of universal jurisprudence, that laws, civil or criminal, must be prospective, and cannot have a retroactive effect. The language of Judge THOMPSON in that case is pertinent to that now under consideration. He said giving to the act a retrospective operation would be productive of wrong and injustice, for it not only takes away a vested right but punishes and endamages the plaintiff in the payment of costs. It can never be presumed from the general words of that statute, that the legislature intended that it should work such injustice. Nothing short of the most direct and unequivocal expression would justify such a conclusion. The best settled rule of construction given by the English courts to the statute of frauds (29 Car. II, ch. 3) goes strongly in corroboration of the interpretation I have given to the act before us. The language of that statute is, "that from and after the 24th of June, 1677, *no action should be brought* whereby to charge any person upon an agreement in consideration, etc." Yet it has been uniformly held that the act would not retrospect so as to take away a right of action to which a party was before that time entitled, but applied only to promises made after the 24th of June, 1677. (4 Burr., 2560; 2 Shower, 17; 2 Mod., 310; 1 Vent., 330.) It must, therefore, be held that the amendment of 1859 did not take away the

right of action of the plaintiffs' testator which was vested and complete before that amendment was made.

It is further contended, that the whole proceedings of the common council of the defendant were void for want of authority, in this, that there was no application of a majority of the property holders, resident of the city of Buffalo, and liable to be taxed or assessed for the proposed ship-canal, to the common council, for the construction thereof, or the taking and appropriating of the land necessary to lay out the same, and that without such application the common council had no power or authority to take the said land or proceed in the construction of the said canal. The provisions of the nineteenth section of the defendant's charter, requiring an application of a majority of the property holders, apply only to the improvements mentioned and enumerated in that section. They are, the grading, building, paving, repairing, macadamizing or graveling any street, alley, lane or highway in said city, or the construction, relaying or repairing, any cross and sidewalks, drains, basins, canals, docks, slips, wharves, sewers and aqueducts therein. It is thus seen that these provisions contain no limitation upon the powers of the common council to take and appropriate the necessary land, which may be required for the laying out, widening, altering or straightening any street, alley, lane, highway, market ground, public ground, canal, basin, wharf or slip, conferred by the sixth section of title eight. The two proceedings are entirely independent of and unconnected with each other, and that authorized by the sixth section can be initiated on the mere motion of the common council, while these improvements called for by the nineteenth section must have for their basis an application from a majority of the property holders directly interested therein and resident of the city. There is no force, therefore, in the objection, that the resolution to take the lands of the testator of the plaintiffs and others for the construction of the ship-canal, was void, because not asked for by a majority of property holders interested therein. It may well be that the common council could not proceed to construct said ship-canal without such application,

but I have no doubt such application was not called for, or required, before they could determine to take the land necessary for that purpose.

The judgment should therefore be affirmed.

All concurring,

Judgment affirmed.

ERASTUS B. SEYMOUR and WILLIAM WELLS, Respondents, v. ROBERT MONTGOMERY, Appellant.

A contract to build the hull of a vessel being wholly executory in its character, passes no title to, or interest in, the vessel, as against parties having no notice of such contract.

APPEAL by defendant from judgment of the Superior Court of Buffalo in favor of plaintiffs.

In the month of February, 1857, four parties, Bidwell, Banta & Co., Sidney Shepard, William Dickson and Robert Montgomery, the defendant, entered into a contract to build a propeller, the total cost of which was to be $45,500, and each party was to own one-quarter.

Bidwell, Banta & Co. were ship-builders, having a ship-yard, and were to furnish materials and build the hull ready for the painters' brush for $25,000.

Sidney Shepard was engine builder, and was to furnish the engine and boilers at a stipulated price, which was more than the value of one-quarter of the propeller (the value of one-quarter being $11,375).

William Dickson and the defendant were each respectively to pay in cash to Bidwell, Banta & Co., $6,812.50, being one-half the balance due to B., B. & Co. of the sum of $25,000, after deducting the value of their one-quarter, $11,375, and were also to pay each one-half the balance due to Shepard for the engine and boilers, after deducting the value of his one-quarter, and were also to pay each one-half of the cost of finishing and outfit.

The defendant and said Dickson were each respectively to have the privilege of buying the said quarter of B., B. & Co., and the quarter of said Shepard, or both, whenever either of them should respectively elect so to do.

On the 25th day of February, 1857, *before the vessel was commenced*, said Dickson elected to purchase the quarter interest of B., B. & Co., and then and there paid them $8,000 to apply first in payment of said $6,812.50, and the balance on the purchase price of their quarter, being the sum of $1,187.50, but there is no evidence that Montgomery was in anywise informed of this purchase.

B., B. & Co. afterward proceeded and constructed the vessel in their own yard and from their own materials, and in the latter part of August, or early in September, 1857, when she was ready to launch, the said firm *sold and conveyed the said one-quarter to the defendant*, for $11,375.50, which the defendant paid except $996.31, which balance the said B., B. & Co. assigned to the plaintiffs, and for which this action was brought. The defense interposed by the defendant to the action was that he did not by this purchase procure the entire title to the one-quarter interest thus purchased, but that William Dickson was the owner thereof to the extent of $1,175, and upward.

The referee decided that the plaintiff was entitled to judgment for said balance, to which decision the defendant's counsel excepted, and his judgment having been affirmed at General Term the defendant appealed therefrom to this court. The case was submitted on printed points.

M. A. Whitney, for the plaintiffs, respondents.

James Sheldon, for the defendant, appellant.

HOGEBOOM, J. The plaintiffs made at least a *prima facie* title to the undivided interest of Bidwell, Banta & Co., in the propeller, or the price thereof, by showing a sale and conveyance of such undivided interest by the latter to the defendant, and an assignment to the plaintiff of the unpaid portion of the price.

The defendant, who undeniably owed this debt, undertook to defend the action by showing a prior executory contract for the sale of such undivided interest to William Dickson, and the payment of a part of the price thereof by Dickson to Bidwell, Banta & Co. The answer to this is, that this contract and payment being before the propeller was commenced to be built was wholly executory in its character and passed no title to or interest in the vessel to Dickson as against the defendant who had no notice of this contract. (*Andrews* v. *Durant*, 11 N. Y., 35.)

That such is the general rule is undeniable, at least since the last cited case, but it is attempted to be taken out of the operation of this rule, by the fact, that Bidwell, Banta & Co., Dickson and Montgomery were, with one Shepard, joint proprietors of the vessel, and in fact jointly concerned in the construction thereof at their joint expense, that under the arrangement between them for such construction Dickson and Montgomery were entitled to purchase of the other parties their interest therein, and that by reason of this arrangement the parties were in effect partners, and each bound to take notice of the interest of the others therein, and its extent both legal and equitable.

But I think they were not partners, but only part owners of the propeller, the agreement was that each should contribute the sum necessary to pay for one-quarter thereof, and each should be one-quarter owner, they contributed this or were to do so in separate sums, and were, I think, to have a several though an undivided interest in the vessel. It is doubtful indeed whether any but Bidwell, Banta & Co., who were the builders of the hull, and in possession thereof, and interested to the largest amount in value in the vessel were the legal owners thereof, until a conveyance thereof by them, although the equitable interests of the other parties would doubtless be preserved as to all parties who dealt with Banta & Co., with knowledge of such equitable interest. Of the right of Dickson to purchase of Bidwell, Banta & Co., Montgomery was of course apprised by the contract, he had the same right himself, but of the exercise of that right he was

wholly unapprised, and in regard to it, I think was not bound to inquire, unless some circumstances beyond the mere terms of the contract were brought to his notice to put, him on inquiry. None such existed, and I think the consequence was, that, however inequitable it was for Bidwell, Banta & Co., with a part of the price of their interest in the vessel in their pockets, paid to them by Dickson, to sell to another person, yet if such sale and conveyance to Montgomery were in fact made, it vested in the latter a title to the property, and obliged him to pay the price, unless Dickson was in some way made a party to the suit, or intervened in his own behalf. The price is nevertheless due from Montgomery, and collectible by Bidwell, Banta & Co., or their assignees. And it must be determined by some future litigation whether the plaintiffs after collecting it are to respond to Dickson for it in whole or in part. Under the present state of the proof, and as between the present parties litigant, I think the judgment of the court below was right, and should be affirmed.

DENIO, Ch. J. The plaintiffs, it is true, can claim no greater rights than that which Bidwell, Banta & Co. could have claimed. The question is, whether, under the facts found, the defendant can claim to have deducted from the purchase price of the one-quarter interest purchased by him, the amount which Dickson had paid on account of his inchoate purchase of the same quarter interest. There is no privity between him and Dickson, which would enable the defendant to avail himself of that payment, by way of set-off, or recoupment. If he can have the benefit of it in any way, it must be on the ground of a partial failure of law in Bidwell, Banta & Co. If it could be said that these parties did not own the whole quarter, but that Dickson owned a part of it, to the extent of his payment, then there would appear to be such partial failure of title. But there are not sufficient facts found to show that any interest passed to Dickson. It is not shown why he did not complete his purchase. If it was on account of his failure to complete the payment, no

interest in the subject passed to him. So if, without fault on his part, Bidwell, Banta & Co. refused to complete the sale to him, or put it out of their power to do so, by disposing of the quarter to the defendant, still no interest passed to Dickson. Bidwell, Banta & Co. became liable to repay him the money he had advanced on account of the purchase, and, perhaps, damages, for not performing on their part, but the title of the property would not be changed. The sale of the quarter to Dickson must be considered executory, and as not conferring any title upon Dickson until the payment should be completed. There was nothing existing at that time of which possession could be predicated. The subject was yet to come into existence, and any contract concerning it must, of necessity, be executory, and not executed.

The question, of course, is, who should lose by the insolvency of Bidwell, Banta & Co.; and it must clearly be Dickson, for they had his money in their hands at the failure. The defendant got the whole interest which he bargained for, and he must, therefore, pay the balance of the price which he agreed to give.

The judgment of the Supreme Court must be affirmed.

All concurring,

Judgment affirmed.

JOHN P. LATIMER, Respondent, v. H. HILL WHEELER, Appellant.

Where the defendant has once been in possession of plaintiff's chattels, but has parted with the same, claiming ownership, a refusal to deliver them up on demand of the plaintiff will render him liable for the same.

Where a party having possession of goods belonging to another, parts with hem without the authority of the owner, and the party holding such goods refuses to deliver them to the owner on demand, he will be liable in *detinue* equally with the party refusing.

DAVIES, J. This action was brought to recover certain goods and chattels, claimed by the plaintiff to belong to him, and which he alleged in his complaint the defendant had become possessed of and wrongfully detained. The defendant in his answer denied that he had become possessed of or wrongfully detained from the plaintiff the said goods and chattels. He also denied the ownership of the plaintiff of the said goods and chattels, and claimed that he was the owner thereof, although not in the possession of the same. He also alleged, in his answer, that from the time of the making of the mortgage to the plaintiff, in January, 1856, until the 25th of October, 1856, the said goods and chattels were in a certain hotel, in the city of Brooklyn, called the "Globe Hotel," and that the same during that period were exclusively in the possession of one Benjamin Rathbone, and that, on that day, Rathbone's possession of said hotel, and of all of said goods and chattels therein, was transferred and delivered to one Carr, who from thenceforth had continued in the possession thereof. It was stipulated between the parties that if the jury should find a verdict for the plaintiff the plaintiff might enter judgment against the defendant for the value of the property as assessed by the jury, with interest, instead of judgment for return of the property. It was also admitted that the goods were not taken by the sheriff, but that they were released upon the defendant giving the undertaking provided for in section 211 of the Code. It appeared upon the trial that Rathbone, in December, 1855, and January, 1856, had purchased a bill of goods of the plaintiff, amount-

ing to the sum of about $400, and that on the 5th of January, 1856, a balance remaining due of $307, he executed to the plaintiff a chattel mortgage thereon, to secure that sum, and which was duly filed the same day.

On the 4th of February, 1856, Rathbone being indebted to the defendant Wheeler, in the sum of $1,000, made and executed to the defendant, a chattel mortgage, payable March 1st, and which was filed March 8th, 1856, and the schedule to this mortgage embraced the same property mentioned in the plaintiff's mortgage, and other property. Rathbone testified that he told defendant of the existence of the mortgage to the plaintiff. He also testified that on the 5th of July he left the hotel and the property there, and also left H. N. Carr in possession. Carr testified that he took possession of the hotel in July and kept it for Rathbone until October 25, 1856, and during the remainder of the time for Horatio P. Carr, his son. Rathbone testified that he surrendered the hotel to the defendant, and at the time of such surrender he was living and keeping a hotel in New York. The defendant testified to his interview with Rathbone in New York, on the 25th of October, 1856, and it is quite clear that this surrender was made at that time by Rathbone, for on that day the defendant agreed to lease the said premises, known as the Globe Hotel, to Horatio P. Carr, until the first day of May next, and he also agreed upon certain payments to be made by Carr, to assign to him Rathbone's mortgage upon the furniture in the hotel, "with all right and title of said Wheeler in all the furniture in said hotel." It also appeared that the arrangement to purchase the furniture was never carried out. It was part of the agreement between the defendant and Carr that the defendant and his family should board in the hotel, and such board was to be deemed equivalent to said rent. Defendant commenced boarding there about a month after the date of this agreement and continued to board there the remainder of the winter. Horatio N. Carr testified that when the agreement was made (October 25, 1856), the defendant told him not to let Rathbone or any one else take any of the furniture away.

The suit was commenced March 25, 1857. Michael Cary testified that he went to the "Globe Hotel" with a copy of the mortgage, at plaintiff's request. Saw the defendant and Mr. Carr there. It was a few days before the suit was commenced. That he opened the mortgage and told the defendant that the plaintiff had sent him for the goods mentioned in the mortgage. He said there were no goods there belonging to the plaintiff. He said they were his, and neither witness or the plaintiff could have them. That the witness told him he would see who they belonged to, and the defendant told him to clear out.

The defendant moved to dismiss the complaint, on the ground that the action could not be maintained against the defendant, as he was not in possession of the property when the suit was commenced. This motion was denied, and the defendant excepted.

The judge charged the jury that if they believed that the defendant told the witness Cary, that he owned the property and that the plaintiff had no property there, or that he treated it as his own, they might find that the defendant had such a legal possession as would enable the plaintiff to maintain this action, to which the defendant's counsel excepted. The defendant's counsel asked the judge to charge, that if they believed Carr was in the actual possession, this action cannot be maintained, which the judge declined to charge, and the defendant's counsel excepted, and the defendant's counsel also excepted to so much of the charge as states that if the defendant was not in the actual possession, yet if he claimed an interest therein and control over the furniture, and refused to deliver it when demanded, he was liable.

The jury found for the plaintiff, and assessed the value of the property at $277.95, whereupon judgment was perfected in plaintiff's favor, in the Brooklyn city court, and, on appeal, the same was affirmed at the General Term of the Supreme Court, and the defendant now appeals to this court.

The case of *Nichols* v. *Michael* (23 N. Y., 264), disposes of all the grounds taken by the defendant upon the trial of this cause, and settles the plaintiff's right of recovery. It is

conceded that the defendant was at one time in possession of the goods covered by the plaintiff's mortgage. On the 25th of October, 1856, he now claims, he delivered such possession to Horatio P. Carr. He certainly claimed then to be the owner of them, for he agreed to sell them to Carr. At the time the agent of the plaintiff demanded of the defendant and Carr the possession of the goods, the defendant denied that there were any goods of the plaintiff's there. He claimed that they were his, and that neither the agent nor the plaintiff could have them, and the defendant told the plaintiff's agent to clear out. Carr was present and must be assumed to have concurred in this refusal of the defendant. If, therefore, he, Carr, had been in the actual possession of the goods, his acquiescence in the refusal of the defendant to deliver the same, and his silence, when the defendant interposed his claim of ownership, was equivalent to a demand upon him and refusal by him. The case of *Jones* v. *Dowle* (9 Mees. & Wels., 19) is quite in point. There the plaintiff had bought a picture at an auction, at which the defendant acted as an auctioneer. The latter, by mistake, entered the name of one Clift as the purchaser and delivered the picture to him. The plaintiff demanded the picture of Clift, who refused to deliver it, and then brought detinue against the auctioneer. The counsel for the defendant insisted that the plaintiff was bound to show that the picture was in the possession or custody of the defendant, or of an agent over whom he could exercise control at the time of bringing the action. But the court overruled the objection. PARKE, B., said: "Detinue does not lie against him who *never had* possession of the chattel, but it does against him who once had, but has improperly parted with the possession of it."

In *Nichols* v. *Michael*, the said theory upon which this case proceeded was sound, and applied directly to that case. It was that where a person was in possession of goods belonging to another, which he is bound to deliver up on demand, if he without authority from the owner parts with that possession to another, who refuses to deliver them, he is responsible in detinue equally with the party refusing. He

contributes to the detention. It is the consequence of his own wrongful delivery. The action in such cases may properly be brought against both, because the acts of both unite in producing the detention.

In the case at bar, upon the defendant's theory, that he was not in the actual possession of the goods at the time of the demand, but that the same were in the possession of Carr, the defendant's liability upon the doctrine of these cases is complete. It is not denied that the plaintiff was the owner of the goods covered by his mortgage, and was entitled to the possession of the same. It is also conceded that the defendant had been in the possession of the goods, and he now claims to exempt himself from liability, on the ground that he had parted with such possession to Carr. He had so parted with the possession without the authority of the plaintiff, the owner of the goods. The demand upon and refusal by both the defendant and Carr gave the plaintiff a complete right of action against both of them. (*Gurth* v. *Howard et al.*, 5 Carr. & P., 346.) And, on the authority of *Nichols* v. *Michael*, the action may be maintained against both, or against the party who has wrongfully parted with the goods.

But, in my opinion, the defendant himself was in the possession of the goods at the time of the demand. Carr's possession was his possession, the latter was but the agent of the defendant, and over whom he could and did exercise control. This is manifest from all the acts of the defendant. Rathbone, who, undeniably, anterior to the 25th of October, 1856, had the possession of the goods, on that day surrendered the same to the defendant. He then, as owner, entered into contract with Carr, to sell the same to him, upon certain terms, which Carr never fulfilled, and he there put Carr into possession as his tenant. He told the father of Carr, who was then at the hotel, as the agent of his son, not to let Rathbone or any one else take anything away. At the time of the demand by Cary, in the presence of Carr, the defendant denied the ownership of the plaintiff of the goods, claimed them to be his, and would not let the plaintiff have them,

and ordered the plaintiff's agent to leave the premises: all this was done in Carr's presence, and it is to be presumed with his assent. And the defendant, in his answer, claims that he is the owner of the goods. All these acts and declarations establish conclusively to my mind the fact, either that the defendant was in the actual possession of the goods at the time of the demand, or, if not, they were in the possession of his agent, over whom he could and did exercise control. In either aspect the defendant's liability is unquestionable.

The motion for the nonsuit was properly denied, and the exceptions to the charge cannot be sustained. If the views herein stated are correct, it follows that the judge properly refused to charge the jury that if they believed Carr was in the actual possession the action could not be sustained, as requested by the defendant's counsel.

The judgment appealed from should be affirmed, with costs.

JOHNSON, J. Only two questions are made in this case: one, on the exception to the charge; and the other, on the refusal to charge as requested.

The judge charged the jury that if they believed the defendant told Cary that he owned the property and that the plaintiff had no property there, or that he treated it as his own, they might find the defendant had such a legal possession as would enable plaintiff to maintain the action. Cary was the plaintiff's agent, and, as he testifies, went to the house where the defendant lived, and where the property was, with a copy of the plaintiff's mortgage, and told the defendant that plaintiff had sent him for the goods mentioned in the mortgage which he then produced. The defendant said there were no goods belonging to the plaintiff there; that they were his goods, and neither the witness nor the plaintiff could have them. Cary said he would see who they belonged to, and the defendant told him to clear out. This was in the presence of Carr, the tenant of the house, and with whom the defendant boarded, and who, as it is claimed, and as the defendant's evidence tends to show, was in the possession of the goods as

tenant under a lease of the house, in which lease he, Carr, had agreed to purchase the goods in question, though he had not then done so.

The appellant's counsel endeavors to maintain the proposition that the defendant, not having the goods actually in his possession at the time, is not liable in this form of action, whatever he may have said or done when the demand was made. But this proposition cannot be maintained, and especially under the circumstances of this case. Here the person who is now claimed to have been in the exclusive possession of the goods, under the contract to purchase, was present when the plaintiff's claim was made, and must be deemed to have assented to the claim of ownership and dominion which the defendant then made. The two lived together in the same house where the goods then were, and no notice or hint was given that any person other than the defendant had any interest in or right of control over the goods. Under such circumstances, it would be a reproach to the law to allow the defendant to defeat the action by showing that another person then present, and not himself, was, in fact, in the lawful possession and custody of the goods. Such a rule would be intolerable, and operate as a snare to innocent parties, proceeding upon the open acts and declarations of adverse parties. The defendant was not a mere stranger to the goods, but claimed title under his mortgage, which was a valid mortgage, but subordinate to the plaintiff's. If he assumed the ownership and dominion, and prevented the plaintiff's taking the property under his superior claim of title he should not be allowed to say upon the trial, for the purpose merely of defeating the action, that the possession was in fact in another at the time. Hence the judge was right in instructing the jury that if the defendant, when the property was demanded, claimed to be the owner of the property, and denied the plaintiff's right, or treated it as his own, they might find that he had such possession as was necessary in law to the maintenance of the action.

It is not necessary to the maintenance of this action that the defendant should be in the actual possession of the property which is the subject of the action.

It has been repeatedly held, that an action of replevin, even in the *cepit*, will lie against the plaintiff in an execution by whose direction goods are levied upon, although such goods are never removed by virtue of the levy from the custody of the owner (*Allen* v. *Crary*, 10 Wend., 349; *Fonda* v. *Van Horn*, 15 id., 631; *Acker* v. *Campbell*, 23 id., 372; *Stewart* v. *Wells*, 6 Barb., 79); and the action either in the *cepit* or the *detinet* would lie in such cases. (*Cummings* v. *Vorce*, 3 Hill, 282.) In all such cases the defendant never has any possession of the property in point of fact. It is the interference and exercise of dominion which constitutes the right of action. That is sufficient possession for the maintenance of the action.

The rule is, that any unlawful interference with the property of another, or exercise of dominion over it, by which the owner is damnified, is sufficient to maintain the action. (*Allen* v. *Crary*, *supra*.) Here there was an unlawful interference, and the exercise of dominion against the plaintiff's rights, by which he was prevented from taking his property, and was thus injured. This was sufficient possession by the defendant for the purpose of maintaining the action against him.

The judge was right, therefore, in refusing to charge as requested by the defendant's counsel, that if Carr, the tenant, was in the actual possession of the goods the action could not be sustained. No point is made by the appellant that the plaintiff's mortgage was not valid, and superior to the one under which he claimed the property. Judgment was entered for the value of the property, instead of a return thereof, in pursuance of a stipulation between the parties before the verdict was rendered. I am of the opinion that no error has been committed, and that the judgment should be affirmed.

All concurring,

Judgment affirmed.

WILLIAM NIBLO, Appellant, v. JOHN BINSSE and LOUISA LA FARGE, Executors, etc., of John La Farge, deceased, Respondents.

Where the plaintiff undertakes to perform certain work upon the house of the defendant, at a price stipulated to be paid, and the building is destroyed by fire before the work is completed, the plaintiff will be entitled to recover for the work performed up to the time of the fire.

In such contract, by the destruction of the house without the fault of the plaintiff, the defendant is put in default, upon the principle that he was bound to finish the house to enable the plaintiff to complete his contract.

Where the owner of property retains possession, and contracts for the performance of work upon it, there is an implied obligation for him to have it on hand and in readiness for the labor to be performed.

THE action was brought by the plaintiff, as assignee of Anthony E. Hitchings, to recover for work done and materials furnished under a contract with John La Farge, the defendant's testator. The contract was dated April 14, 1853, and by it the said Hitchings agreed to furnish and put into a certain building then being built by the testator in the city of New York, known as the La Farge House and Metropolitan Hall, certain steam works, pipes and coils, for heating the rooms and conveying hot and cold water to different parts of the building. The work, by the terms of the contract, was to be completed by the 1st of October, 1853, under the superintendence of an architect named, and Hitchings was to be paid $10,000 for the job, as follows: $7,500 in certain sums specified, as certain parts of the work should be completed; $1,500 when the work was all finished, and the balance, $1,000, to be paid when the work was tested and found to be sufficient according to the provisions of the contract. All the payments were to be made upon the certificate of the architect that the work was done according to the agreement. Hitchings began the work, but did not complete it by the 1st of October, 1853, according to his agreement, and continued working upon the job until the 8th of January, 1854, when the whole buildings were destroyed by fire without any fault upon the part of La Farge or of Hitchings. La Farge

had in the mean time paid Hitchings on account of the work $7,500 without any certificate of the architect. Of this sum $1,000 was paid October 24th, 1853, and $1,500 some time in December, 1853, while the work was being carried on, and after the work was to have been finished by the terms of the contract. At the time of the fire the work remaining to be done and the materials to complete the contract would have cost $1,000. Previous to the fire the concert room had been opened and used for concerts several times, but the hotel had not been opened for guests. No test had been applied to determine the sufficiency of the work as far as it had been done, and no certificate of the architect was ever procured.

After the fire, La Farge kept and retained for his own use the iron pipe which was put into the building by Hitchings, and sold the same to the latter for $1,000. The demand was duly assigned by Hitchings to the plaintiff. La Farge died and the defendants are his executors, duly appointed. Upon these facts the referee, to whom the cause was referred to try and determine, held, as a conclusion of law, that the plaintiff was not entitled to recover, and judgment was thereupon entered in favor of the defendants. From this judgment the plaintiff appealed to the General Term of the Supreme Court in the first district, where the judgment was affirmed, and he thereupon brought his appeal to this court.

W. F. Allen, for the appellant.

T. J. Glover, for the respondents.

JOHNSON, J. It was held, both by the referee and the Supreme Court at General Term, that the plaintiff was not entitled to recover merely because the work was not finished and the job completed at the time the building upon which the work was being done was destroyed by fire. To my mind, this is a very plain case in favor of the plaintiff. The decision, very properly, was not put upon the ground that the work was not completed within the time specified in the agreement, but upon the naked ground that the contractor, having failed to do all the work he had contracted to do,

could not maintain the action. It is plain, upon the facts found, that the time of performance had been extended by the mutual assent of the parties to the contract. When the time expired the agreement was not rescinded or terminated by the owner of the building, but the contractor was allowed to go on under it, and in performance of it, until the building was destroyed by the fire. Payments were made in the mean time, and the contract treated as in all respects in force by both parties. The work was in progress, and nine-tenths of the labor and expense had been performed and incurred when the further prosecution of the work was arrested and its completion prevented by the destruction aforesaid. The case is to be treated, therefore, precisely as though the destruction of the building had occurred before the first of October, 1853, when by the terms of the contract the work should have been finished. No principle of law is better settled than this, that when one party has, by his own act or default, prevented the other party from fully performing his contract, the party thus preventing performance cannot take advantage of his own act or default and screen himself from payment for what has been done under the contract. The law will imply a promise on his part to remunerate the other party for what has been done, and support an action upon such implied promise. (2 Pars. on Con., 35.)

This case falls exactly within this principle of law. Through whose default was it that the work was not completed according to the contract? Certainly not that of Hitchings, the contractor; for he was ready and willing, and was in act of performing when prevented by the destruction of the building. He was a mere laborer upon the building, having no possession or control over it for any other purpose; and the destruction of it was through no act or agency of his. Manifestly the performance of the contract was prevented by the default of the other party, who furnished and provided the building upon which the work was to be done as far as the work had progressed, but failed to furnish or provide it for the completion of the work. It was his building, in his possession, and under his exclusive con-

trol; and, as a material and substantive part of his contract, he was to have it in existence ready for the work, and continue it in existence, and in a proper condition for the work to be performed upon it, as long as it was necessary under the contract, or as long as the contract was continued in force by the consent of the respective parties. If one party agrees with another to do work upon his house, or other building, the law implies that the employer is to have the building in existence upon which the work contracted for may be done. It is necessarily a part of the contract on the part of such employer, whether it is specified in it in terms or not. Here the defendant's testator failed to provide and keep the building till the work could be completed, and thus, and thus only, was performance prevented.

It is nothing whatever to the case to say that the building was not destroyed through his agency or fault. That fact is no test of the liability in an action like this. It would not excuse or shield the defendants from liability even were the action to recover as damages the profits which might have been made on that part of the work the performance of which was prevented. The destruction was not caused by the act of God, as appears by the facts found; and a default from any other cause will not excuse non-performance.

This rule was applied and enforced by this court in *Tompkins* v. *Dudley* (25 N. Y.) very properly, undoubtedly, though the case was a very hard one for the defendants. The school-house which they had contracted to build was substantially finished, according to the contract, but it had not been accepted by the plaintiffs, a small amount of painting and the hanging of the window-blinds remaining to be done before the job was finished. In this situation the house took fire and was destroyed, and the plaintiffs were allowed to recover back moneys they had advanced on the contract, and damages for its non-performance. It was a casualty not provided against in the contract, which the defendants had bound themselves fully to perform. This rule, it will be seen, applies with full force against the defendants in this action, but in no respect is it applicable to

the plaintiffs. The defendant's testator was to provide the building in which the work was to be done. That was part of his obligation, and he had not provided for the contingency of its accidental destruction during the continuance of the work, by his agreement. The plaintiff's assignor had no occasion to provide, in the contract, for the default of the other party in the performance of his part of the obligation. The law provides for that. It was never heard that the contract must provide against the default of a party, in order to give a remedy to the other party who is affected injuriously by it; unless, indeed, some extraordinary remedy is sought which the law, without an express stipulation, does not give. The obligation of the defendant's testator seems to have been entirely overlooked in the Supreme Court, or else it was assumed that the destruction of the building did not place him at all in default, unless he had some agency in such destruction, by which the performance was prevented. This I regard as a fallacy, and it is this, obviously, which produced the erroneous judgment against the plaintiff.

The case of *Menetone* v. *Athawes* (3 Burr., 1592) is very much in point here. The plaintiff was employed to make certain specified repairs upon a vessel lying at his own shipyard. Before the repairs were fully completed a fire broke out in a neighboring store and extended to the vessel and destroyed it. The defendant in that case, as in this, contended that the plaintiff could not recover, because his agreement to repair was not fully performed. But it was held that the plaintiff was entitled to recover *pro tanto* for the work and materials, as far as he had gone, in the performance of his undertaking. This seems to be the settled rule in all cases between bailor and bailee when the article is delivered to the latter, to be repaired or wrought into a new form, and is accidentally destroyed before the work is finished and ready for delivery, without the fault of the mechanic. The loss in such case falls upon the owner of the article, and he must answer for the labor already bestowed and the materials if any, furnished. (2 Kent's Com., 590; Story on Bailments § 426, *a*; *Gillett* v. *Maomen*, 1 Taunt., 137.) It may per

haps be different in such a case, where the work is done upon an express contract as a job, because the owner by delivering the article to the mechanic has done all he could do. He has performed so far all that was within the contemplation of the parties, and all the law could require of him, and it would be impossible for the mechanic in possession to allege that he was prevented from performing by any act or default of the owner. (See Story on Bailments, § 426, *b.*) His non-performance in that case not being occasioned by the act or default of the other party, it is difficult to see how, according to our rule, he could maintain the action. But it is manifestly entirely different where the owner of the property retains possession and contracts for work to be done upon it while in his own custody. In such case there is an implied obligation resting upon him to have it on hand and in readiness for the labor to be performed upon it. That is the case put by WILMOT, J., in *Menetone* v. *Athawes* (*supra*), "of a horse which a farrier is curing, and which is burned in the meanwhile in the owner's own stable," as one in which the owner would undoubtedly be liable for the skill and care bestowed. The work is not completed because the owner, whose duty it is to keep the article on hand in order to receive the labor and skill upon it, fails to do so and is in default. That is this case in effect. The difference in the nature of the property upon which the work was to be performed does not affect the principle.

When full performance is prevented by the authority of the State, the party may recover for his labor and materials up to the time the State interferes and stops the work (*Jones* v. *Judd*, 4 Comst., 411.) I lay no stress whatever upon the fact, that the owner used the building more or less while the work was in progress, because in this State the rule is well settled that use and occupancy constitute no ground of liability if the contract is not performed. (*Brady* v. *Smith*, 17 N. Y., 173.) And if the non-performance was occasioned by the act or default of the other party, use and occupancy are of no moment. Nor is it of any consequence, in my judgment, that the defendant's testator kept

the iron pipes, which the other party had placed in the building, and sold them after the fire. They were clearly his property, made so by being placed in his building under the contract. And his using them or disposing of them after the destruction of the building does not, in any way that I can perceive, affect the question of his liability.

I rest the right of the plaintiff to maintain his action distinctly upon the ground that his assignor was prevented from performing his contract by the default of the other party in failing to keep on hand and in readiness the building in which the work was to be done, and that the other party was clearly in default whether the building was destroyed with or without fault on his part. If these views are correct the action should have been sustained, and the plaintiff allowed to recover for his labor and materials, according to the contract, as far as he had gone, deducting the amount paid and perhaps any damages which the owner may have sustained in consequence of the non-performance by the time stipulated in the contract. The judgment must, therefore, be reversed, and a new trial granted, with costs to abide the event.

All concurring,

Judgment reversed.

NICHOLAS GENTER, Respondent, v. SETH H. FIELDS, late sheriff of Otsego county, Appellant.

On an appeal from the Special to the General Term, the undertaking provided for by section 335 of the Code constitutes no part of the appeal. Its only effect is to stay proceeeings upon the judgment.

It would be error for the General Term to dismiss an appeal from the Special Term because the appellant had failed to comply with an order of the Special Term to execute a new undertaking.

APPEAL from an order of the General Term of the Supreme Court, in the sixth district, dismissing an appeal from a judgment at Special Term to General Term. A judgment was rendered against the defendant June 25th, 1857, for $985.94, upon a verdict at the Circuit. The defendant appealed from the judgment to the General Term, and for the purpose of staying proceedings upon the judgment, filed an undertaking, with sureties, who duly justified on the 8th of August, 1857. In August, 1859, the appeal being still pending, and the sureties having become insolvent, the plaintiff applied at Special Term for an order requiring the defendant to execute a new undertaking, according to sections 335 and 348 of the Code, as amended in 1859. The court granted the order, and the defendant appealed therefrom to the General Term, where the order was affirmed. The defendant neglected to file a new undertaking according to the requirement of the order, and in January, 1860, the plaintiff moved the court at General Term to dismiss the defendant's appeal from the judgment, on that ground.

The court granted the order dismissing the appeal. From that order the defendant appeals to this court.

James E. Dewey, for the appellant.

Dewitt C. Bates, for the respondent.

JOHNSON, J. There can be no doubt that an appeal to the General Term of the Supreme Court, from a judgment rendered at Special Term, when made according to the provisions

of section 327 of the Code, is complete and effectual as an appeal for all purposes, except the staying of the proceedings upon the judgment.

If the party appealing desires a stay of proceedings upon the judgment in such a case, he must, in addition to the service of the notices prescribed by section 327, execute to the other party the undertaking provided for by section 335 of the Code. The undertaking is no part of the appeal, which is effectual without it, but operates only to suspend all proceedings upon the judgment pending the appeal. This is the well settled practice, and is in entire harmony with the several provisions of the Code. (*Kitching* v. *Diehl*, 40 Barb., 433; *Niles* v. *Battershall*, 26 How. Pr., 93; *Staing* v. *Jones*, 13 id., 423.) Many other cases might be cited, but there is no doubt as to the practice. Section 348 of the Code expressly provides that "Such an appeal, however, does not stay the proceedings unless security be given, as upon an appeal to the Court of Appeals, *and such security be renewed*, as in cases required by section 335, on motion to the court at Special Term, or unless the court or a judge thereof so order," etc.

This is different from appeals to the Court of Appeals, which are not effectual for any purpose unless an undertaking be executed by the appellant for the payment of all costs and damages which may be awarded against him upon the appeal, not exceeding $250, as provided for by section 334. This provision has no application whatever to appeals provided for by chapter four of the Code under which the appeal in question was brought, and which relates exclusively to appeals in the same court from a single judge to the General Term thereof.

This chapter contains no provision for the dismissal of any appeal because an undertaking has not been executed or renewed in pursuance of an order to that effect. The only provision on the subject of an undertaking, in this chapter is contained in section 348 already cited. If no undertaking is executed by the appellant, the judgment may be enforced the same as though no appeal had been brought, but the appeal is still effectual and to be heard. And so if an undertaking

has been executed and proceedings upon the subject thereby stayed, the stay ceases and becomes inoperative, if the undertaking is not renewed in pursuance of an order of the Special Term requiring such renewal, and the judgment may then be enforced the same as though there had been no stay.

Neglect or refusal to comply with the order to renew the undertaking, operates upon the stay of proceedings on the judgment, and puts an end to it, but in no respect affects the appeal.

The penalty of dismissal of the appeal, in case of neglect to execute the new undertaking, in pursuance of the order prescribed by section 335 applies only to appeals to the Court of Appeals. It is not made applicable to any other class of appeals, either by its terms, or by the policy of the Code. In appeals of this kind the penalty for the neglect to execute such new undertaking is, that the proceedings upon the judgment are no longer stayed. This is plain from the manner in which section 348 was amended in 1859, which was by inserting, "and such security be renewed as in cases required by section 335 on motion of the court at Special Term." This is added as something further to be done by the appellant to affect or to continue a stay pending the appeal.

The plain object of the amendment was to remedy a defect in the section as it before stood, and to prevent or determine the stay after the sureties had become insolvent, but not to affect the appeal.

The Supreme Court erred therefore in holding that the effect of a non-compliance with their order to renew the security, was to vitiate the appeal.

The dismissal was not a matter of discretion, but of strict legal right, and as the effect was to prevent a judgment from which an appeal to this court might be taken, it is an appealable order. (Code, § 11; *Bates* v. *Voorhees*, 20 N. Y., 525.) The order dismissing the appeal should therefore be reversed with costs of the appeal.

All concurring,

Judgment reversed.

THE BLOSSBURG AND CORNING RAILROAD COMPANY, Respondents, v. THE TIOGA RAILROAD COMPANY, Appellants.

This case presents merely a question of the construction of the language constituting a clause of the contract.

A patent ambiguity in a written contract cannot be explained by parol evidence.

HOGEBOOM, J. The only serious question in this case arises upon the construction to be given to the agreement made between the parties on the 29th day of July 1851. As the ambiguity, if any, is patent upon the face of the instrument, parol evidence to explain its meaning was properly excluded. By this agreement, the road was to be operated for the mutual benefit of the parties. The plaintiffs were to furnish the road, free of charge to the defendants, together with all necessary depots, machine shops, engine houses, and grounds. The defendants were to furnish the necessary rolling stock and motive power, and to operate the road between Corning and Blossburg, for the purpose of transporting passengers, mails and freights for all the regular business that should be furnished to the railroad. Uniform rates of tolls and charges for transportation of passengers, mails and freights on said road, were to be established annually by the mutual agreement of the parties, and in case of their disagreement, by disinterested persons to be chosen by them. The defendants were to pay the plaintiffs two-thirds of the receipts for passengers, mails and freights—"the expenses charged customers for the loading and unloading coal, lumber and other freights, and for warehousing *and such additional charges by way of discrimination as should be made for short distances for motive power, not to be included in the term receipts as above mentioned.*" The question arises on this latter clause "additional charges by way of discrimination for short distances for motive power."

Under this contract, the parties agreed upon a tariff of rates, both for freight and passengers under the provision in

the contract which called for the establishment of "uniform rates of tolls and charges for transportation of passengers, mails and freights." These rates were in one sense—probably in the sense intended by the contract—*uniform*, that is, not fluctuating during the period for which they were established, but they were not graduated at the same uniform rate per mile for long and short distances. On the contrary they differed materially according to the distance traversed, being greater for the short distances, and less for the long distances. The whole length of the road was forty-one miles. Between the termini at Blossburg and Corning, there were nine intervening passenger, and twelve intervening freight stations, at various distances from five to thirty-six miles from the termini of the road. There were no established or agreed charges for loading and unloading coal, lumber and other freights, or for warehousing; and none additional by way of discrimination for short distances for motive power, unless they were included in, and were in fact the identical discriminating rates contained in the tariff of uniform rates before mentioned, established by the mutual agreement of the parties. This latter construction is the one claimed by the defendants, who contend that they are entitled to the *entire* excess of receipts for passengers, mails and freights to and from all the intervening stations, beyond what those receipts would have been if charged at the same rate per mile, as is by that tariff of rates charged per mile for the entire distance between Blossburg and Corning; whereas, the plaintiffs contend that the parties were to participate in the proportions provided by the contract in *all* the receipts for whatever distances resulting from the uniform rates agreed on by the parties, and that the additional charges by way of discrimination for short distances for motive power spoken of in the contract, refer only to additional charges beyond those contained in the tariff of uniform rates. The referee of the Supreme Court adopted this latter construction of the contract, and if it be the correct one the judgment should be *affirmed*, if it be not, then the judgment should be *reversed* and a new trial granted with costs to abide the event.

1. The tariff of rates before mentioned, seems to be "uniform rates of tolls and charges for transportation of passengers, mails and freights," mentioned in the contract. Such is the practical construction given to it by the parties.

They *agreed* upon it as such and adopted it for one year, according to the requirements of the contract. Counsel for both parties so assume the fact to be on this argument.

Such is the fair interpretation of the contract. Uniform rates, in the sense here used, mean, I think, rates, which, for the time they are established, shall be kept at the same point, and shall not be variable or fluctuating. We may perhaps, take judicial notice of a fact so notorious as that railroad rates differ almost universally in the rate per mile between short and long distances, unless prevented by legislative restrictions. We may therefore conclude that when the parties contracted for uniformity of rates, they did not intend to lose sight of this well-established usage among corporations of this description.

2. I think the plaintiffs were intended to participate in all the uniform rates of tolls and charges, at the prices established in the tariff of rates.

These were the receipts for passengers, mails and freights, of which the contract declares they shall be entitled to two-thirds.

These uniform rates were established by the *mutual agreement* of the parties, because they were *mutually* to share in the receipts arising therefrom. Their mutual interest required that they should each have a voice in fixing these rates and graduating them at the proper standard. No unjust discrimination was to be made in favor of short distances in the established rates, to the general prejudice of the railroad, without the consent of both parties. As one furnished the motive power, and the other the track and fixtures, it was foreseen that they might possibly differ in graduating the tariff of rates, and provision was made for adjusting such differences of opinion.

3. The *additional* charges spoken of in that clause of the contract now in question, are *exclusive* of those contained in the table of uniform rates.

This is a reasonable inference, from the fact that they are spoken of in connection with other charges thus obviously excluded. The charges for loading and unloading, and for warehousing, are confessedly not included. Why then should *these* charges spoken of in the same connection, be deemed to be included.

The charges for loading and unloading and warehousing, are left to the discretion of the defendants. It is fair to presume that *these* were designed to be of the same character, and to be disposed of in like manner.

The charges here spoken of, are *additional* charges, and it is reasonable to conclude that they were *additional* to those theretofore authorized. The language of the agreement is not that *all* discriminative charges shall be excluded from the receipts which are to be subject to division, but such *additional* discriminative charges as shall be made for short distances, for motive power. The uniform rates had made, or were expected to make, discriminative charges. These charges were not exclusively for *motive power*. They were made upon general considerations as to the prices which the patrons of the road would submit to for the privileges enjoyed and the services rendered, and they were placed, doubtless, at as high a rate as was deemed to be consistent with the success of the enterprise. They were not governed simply and precisely by the amount of expenses incurred or services rendered, but by the laws of trade, and of demand and supply. At some points there might be danger of diversion of trade or travel to rival roads, and this would dictate a reduction of prices. At other points where no such danger existed and property required a market, an increase of prices might be sound policy.

It is possible that the rates for the entire length of the road might be put below a strictly compensatory standard on a consideration of the fact that intervening stations would bear a higher tariff, we are not to conclude that the price for the longest distance was necessarily the standard and remunerative price which was to graduate and control all the others. As in all the other cases, a great variety of considerations

entered into this question of prices. When, therefore, the contract speaks of additional charges by way of discrimination for short distances for motive power, I think it means strictly what it says. 1. That the charges referred to are *additional* charges, additional to those contained in the tariff of uniform rates. 2. Additional, *discriminative* charges beyond the discriminative charges contained in the table of uniform rates. 3. Additional, discriminative charges *for short distances*, not for long distances, not for distances nearly the whole length of the road. 4. Additional, discriminative charges for short distances, *for motive power*, not for other purposes, not founded upon general considerations as to the policy of favoring the transportation of a particular class of freight, or preventing a diversion of custom to competing railroads. Hence, also, I am of opinion that by the terms of the contract, these additional charges might be lawfully imposed by the defendants for the purposes specified, beyond the charges fixed in the uniform tariff of rates adopted by the parties. It is supposed this could never have been intended, as it would leave the interests of the road at the mercy of the defendants. But to this it may be answered: 1st. That the same argument might be applied to the charges for loading and unloading and warehousing, which might be put at extravagant and extortionate rates. 2d. That the defendants, equally with the plaintiffs, were interested in the pecuniary success of the road, and in the same direction, and that ordinarily this would operate as a sufficient check upon excessive charges. It may well be conceived that contingencies might arise where for short distances, and short distances alone, an excess of motive power beyond the ordinary wants of the road, might be required, and I have no doubt that the charges for this extraordinary service rendered by the defendants alone and to be paid to them alone, were deemed safe to be confided to the integrity and judgment of a partner in the general enterprise whose interests would suffer in common with those of the plaintiffs by a rate of charges which would amount to a prohibitory tariff. This conclusion is somewhat strengthened, I think, by the language of the contract

which requires the defendants to furnish "the necessary motive power, engines, machinery and cars for all the *regular* business that shall be furnished to said railroad," fairly implying that an extraordinary supply of motive power might be compensated by discriminative charges adapted to the emergency.

In short, the *discrimination* referred to was not a discrimination between the prices thus charged and the *lowest rates* charged in the agreed table of uniform rates, for no rate *per mile* for any distance was ever agreed upon, and there was, therefore, no means of determining what particular gross rate should be selected from which to discriminate, but a discrimination between the prices thus charged and the prices charged for the same distance in the table of uniform rates in consideration of the surplus motive power thereby required.

When, therefore, the contract declared that the defendants should pay to the plaintiffs two-thirds of the receipts for passengers, mails and freights, as the generality of the expression might, perhaps, be deemed to include the entire receipts from all sources whatever, it was apparently thought best, by way of precaution, to declare that in this term were not to be included charges for loading, unloading, warehousing, and extraordinary supplies of motive power for short distances.

This, I think, is the fair and reasonable interpretation of the contract and the most consistent with the probable intention of the parties thereto.

I am for affirming the judgment of the court below.

Affirmed.

WILDY RICKERSON, Appellant, v. PAUL RAEDER, Respondent.

Where a party wishing to purchase chattel property which is mortgaged, pays to the mortgagee a part of the consideration of the purchase, upon an understanding that the chattel shall be released, and the mortgagee will look to the mortgagor for the balance, such transaction is in itself a release of the mortgage.

JOHNSON, J. In the action before the justice, the defendant justified the taking and selling the colt under his chattel mortgage.

The plaintiff's answer to this defense was, that the defendant had received payment of the amount due on the mortgage, except five dollars and the interest, and that he had agreed to discharge the mortgage for the residue, and look to the mortgagor personally for such residue. The alleged payment consisted of a note of hand for fifty dollars, against one Johnson, six dollars in money, and a credit of ten dollars on book account by the mortgagor. The evidence tends to show that the defendant agreed to release the colt from the mortgage in a day or two after the payment, but never did so. The note belonged to the plaintiff, who let the mortgagor take it, to apply on the mortgage, and toward the purchase price of the colt. The defendant had notice when he took the note, that the mortgagor was about to sell the colt to the plaintiff. The plaintiff knew of the existence of the mortgage, which was also duly filed. The defendant instead of discharging the mortgage, returned the fifty dollar note to the mortgagor from whom he received it, within a few days after the same was transferred to him. The evidence tends to show that the plaintiff bought the colt, and paid the mortgagor for it, after the alleged agreement to discharge the mortgage, the price of ninety dollars, including the Johnson note. The action seems to have been tried before the justice, upon the assumption that the note was in fact of little or no value. The questions which appear to have been principally litigated before the justice were, the agreement

on the part of the defendant to discharge the mortgage, and the fraud on the part of the mortgagor, when he turned out the note in representing it to be good as cash. The plaintiff obtained a verdict for the value of the colt.

It must be presumed, I think, that the jury passed upon the question of the fraud in turning out the note against the defendant. Otherwise they could not have rendered their verdict against him. This being the case, their verdict in favor of the plaintiff for the value of the colt, was, I think, clearly right. Upon this hypothesis the defendant, knowing that the plaintiff was about to purchase the animal of the mortgagor, provided he could have the note applied in payment, agreed to take this note belonging to the plaintiff and relinquish the claim of his mortgage upon the colt and look to his debtor personally for the small balance remaining unpaid. The plaintiff then buys the colt, being informed that the claim of the mortgage is by agreement to be relinquished, and pays the full price, including the note, which the defendant has already taken. After this it seems to me the defendant should not be allowed to enforce his mortgage for any amount against the plaintiff, purchasing in good faith. The plaintiff in fact paid a part of the mortgage, which he was under no legal obligation to pay, and the agreement to discharge, as respects him, had certainly a good consideration to support it. The defendant having consented in effect that the mortgagors might sell the colt discharged from the lien of the mortgage, and received a portion of his pay from the purchaser as a consideration of his agreement, ought not to be permitted now to turn round and enforce the mortgage against such purchaser. It is the same in principle as though the defendant had sold the colt himself to the plaintiff. It is no answer to say that the defendant did not in fact discharge the lien of his mortgage according to his agreement. He was bound to do so, and other rights have intervened on the faith of his agreement, they must be protected. The plaintiff under the circumstances took the colt free from all claims of the defendant and discharged from the mortgage. The law effectuated the discharge, without any act on the

part of the defendant, the moment the sale was completed according to the agreement.

Although we may not be satisfied entirely with the verdict of the jury, still there was evidence tending to the conclusion at which they arrived, and a court of review has no right to interfere with their finding in such a case. I am of the opinion, therefore, that the judgment of the Supreme Court was erroneous and should be reversed, and that of the County Court and of the justice affirmed.

Judgment accordingly.

DELOS BARTLETT v. LEVI B. TARBOX.

A person transferring a promissory note is not the assignor of a thing in action within the meaning of section 399 of the Code of Procedure.

The admission of distinct facts during a negotiation for a settlement, is competent evidence against the party making it.

APPEAL from judgment of Supreme Court. The action was brought in December, 1851, to recover the amount of four promissory notes made by the defendant; one dated March 2d, 1846, for $15; another August 10th, 1846, for $150; another November 18th, 1846, for $13; and another April 2d, 1849, for $99.84.

The defense set up was payment and a set-off against Elijah Brown, an attorney-at-law, the former holder of the notes, and that the plaintiff was not the owner and holder. One of the allegations in the answer was that Brown, at the time of the sale and delivery of the notes to the plaintiff was, and still is justly indebted to the defendant in the sum of about $300 for one promissory note executed by one Solon P. Huntington, which the defendant sold and delivered to Brown in the month of June, 1849, and which note was paid by Huntington to Brown, and which remains unpaid to the defendant.

The cause was referred to S. H. Harrington, Esq. On the trial it appeared that Brown, on the 25th November, 1851, for a valuable consideration, sold and transferred the notes in suit to the plaintiff; and the principal matter litigated was the state of the accounts between Brown and the defendant when this transfer was made. Brown had been the attorney and counsel of the defendant for several years, and it was not disputed that the notes were valid claims against the latter in his hands; but it was claimed that allowing the Huntington note and the defendant's account against Brown for services as a set-off to the notes and Brown's account against the defendant, left nothing due from the latter to Brown, but on the contrary, there would be a balance in his

favor. On the other hand, Brown claimed that in June, 1849, when the Huntington note was sold to him, the defendant was indebted to him in a sum exceeding the amount of such note for certain bills of costs due and owing to him from the defendant, and for services rendered for the latter as attorney and counselor-at-law, and for moneys paid and expended for him; that by agreement between the parties, that note was to be applied toward the payment of this indebtedness, and the note was applied thereon in pursuance of such agreement at the time of the receipt thereof. It was further claimed that crediting the defendant all that Brown ever received from him, even including the Huntington note, left a balance due Brown above the notes of over $50 at the time he transferred them to the plaintiff.

The referee found as facts, that the defendant made the notes set out in the complaint; that they were sold and delivered to the plaintiff before the commencement of the action; that he purchased all of them for a valuable consideration paid by him, and is the owner and holder thereof; that no part thereof has been paid, and that the total amount due on them (including interest), is $485.80.

The referee further found that the defendant, some time in the month of June 1849, sold and delivered to Elijah Brown, a promissory note made by one Solon P. Huntington, for the payment of $283.83, which was subsequently paid by said Huntington to said Elijah Brown; that at the time of the sale of said note to said Brown, the defendant was indebted to the said Brown in a sum of money exceeding the sum of $283.83, for certain bills of costs due and owing from the defendant to said Elijah Brown, and for services, work and labor, rendered, done and performed by said Brown, for said defendant, as attorney and counselor-at-law; and for money paid and expended by said Brown for him, toward the payment of which the said note of the said Solon P. Huntington, by an agreement between the said defendant and said Brown, was to apply; that said note was applied thereon, in pursuance of said agreement, by said Elijah Brown, at the time of the receipt thereof.

The referee further found that the defendant failed to prove any matter of set-off in his answer mentioned.

Upon these facts his conclusion of law was, that the plaintiff was entitled to recover of the defendant the amount of the notes; and that the defendant was indebted to the plaintiff in the sum of $485.85, being the interest and principal due thereon.

On the trial, the plaintiff offered Elijah Brown as a witness in the action. The defendant's counsel objected to his being sworn and examined, on the ground, first, that the proof of service of notice of his examination was insufficient; second, that the notice was not sufficient, and not a compliance with the statute, for the reason that it did not specify the points on which the witness would be examined. The objections were overruled, and Brown was sworn and examined as a witness. (The notice was that Brown would be examined generally as a witness on the trial of the cause for and on behalf of the plaintiff thereon.)

One Stephen Estes testified that he was present at an interview in Brown's office in September or October, 1851, between the defendant and Brown. During the interview the account books were produced between Brown and defendant, and the accounts were looked over from the books. He recollected *that defendant said Brown's account was all right, and he would allow it if Brown would allow his.* At this stage of the witness' examination, the defendant proposed to put preliminary questions to show that the parties were trying to settle. This was allowed, and the witness said, "they appeared to be trying to settle at the time, and had the books out for that purpose." The defendant then objected to the evidence, and to all the evidence on the same subject, for the reason that the parties were negotiating a settlement. The objection was overruled, and defendant excepted. The witness continued: "I did not read over the whole account." The defendant said: "Prophet, it's all right, if you will allow my account I will allow yours." The defendant asked the referee to strike out the last evidence, on the ground that it is a proposition to settle, and a conditional

offer, which was refused and defendant excepted. The defendant's account or claim, made at this time, consisted of two items; one of $25 for promoting Brown's election as district attorney, and another of $50, for promoting John Brown's election as sheriff.

When Brown was cross-examined, the plaintiff offered his book containing the accounts, on pages 86 and 88, looked over by defendant and Brown, and examined, at the time spoken of by the witness Estes, not as evidence of any items not proved, but to identify the accounts and as confirmatory testimony. The defendant's counsel objected to it as being incompetent and immaterial, and not being proved according to the rules of evidence, and that from Brown's own evidence the book contains false charges, and is not evidence in the cause, and that the admissions in reference to it were made during an effort to settle. The witness being further interrogated said: That the book was the same book that was produced at the office, and that it contained the same charges, and was all correct, and were all looked over by the defendant, and there had been no alteration in the account since, but it was in the same condition as when looked over by defendant. The referee overruled the objection and decided to receive the book for the purposes offered, and defendant excepted.

The case states that near the close of the trial, the plaintiff offered in evidence all the papers, receipts and bills of costs heretofore proved and marked by the referee. Objected to by the defendant separately and collectively, on the ground that they are incompetent and immaterial evidence, and the acts and declarations of third persons. Objection overruled, and defendant excepted.

Philip G. Schermerhorn testified on his examination by defendant to a declaration made by Brown in the summer of 1851, to defendant, that if Huntington had paid up his note in full, there would be a small balance due the defendant. Subsequently the plaintiff called *John Brown*, and offered to show by him a conversation with Schermerhorn and to contradict him in the evidence given by him. The testi

mony was objected to by the defendant on the ground that Schermerhorn's attention was not called to the alleged conversation, nor the time or place of it; and the objection was sustained. Afterward the witness was recalled by plaintiff, and, without objection, testified to a conversation with Schermerhorn the fall before the trial, in which the latter stated in substance, that he had never heard any conversation between defendant and Brown in relation to these matters, and knew nothing about them.

Judgment was entered on the report of the referee, and the defendant appealed to the General Term of the Supreme Court, where the judgment was affirmed. He now appeals to this court.

Edgar F. Brown, for the plaintiff.

L. L. Bundy, for the defendant.

WRIGHT, J. The defendant's notes were transferred to the plaintiff in November, 1851, by Elijah Brown, a former owner and holder. Two defenses were interposed, First, that the plaintiff was not then owner, but that they were the property of Brown; and, second, a set-off against Brown. The set-off claimed was the amount of a note ($283.83) made by one Huntington, which it was alleged the defendant sold to Brown in 1849, and which had been paid to the latter; also, for moneys received by Brown, to and for the use of the defendant, and money paid by the latter to the former during the six years prior to 1851; and also, for work and labor done and performed by the defendant for Brown, in the years 1846, 1847 and 1848. The finding of the referee disposes of both these defenses adversely to the defendant. It is found that the plaintiff was, at the commencement of the action, the owner and holder of the notes, having purchased them for a valuable consideration; that at the time of the sale of the Huntington note to Brown, the defendant was indebted to him in a sum of money exceeding the amount of the note, for certain professional services, toward the payment of which, by an ageement between the parties, the note

was to apply; and Brown, at the receipt thereof, in pursuance of the agreement, applied it in part payment of the defendant's indebtedness; and that the defendant failed to prove any matter of set-off mentioned in his answer. The findings are not the subject of review in this court. It was competent for the Supreme Court to have reviewed the case, both upon the facts and the law, but our jurisdiction extends only to the determination of legal questions. We can not look into the evidence to determine whether the facts were or were not correctly found; but taking them as found by the referee, our power is limited to the inquiry whether he deduced the proper legal conclusions from them. That there was no error in this respect is clear; and there must be an affirmance of the judgment, unless some error was committed on the trial to the prejudice of the defendant.

The defendant's counsel, in his points, insists that there were several errors of the latter description. Those pointed out will be briefly noticed:

1. Elijah Brown, the person who transferred the notes to the plaintiff, was sworn and examined as a witness in his behalf, the defendant objecting on the grounds of the defectiveness of the notice given of his examination, in not specifying the points on which he would be examined. The objection assumed that Brown was the assignor of the plaintiff's demand within the meaning of section 399 of the Code, as the section read, and the law stood at the time of the trial; and that in all cases the ten days' notice of the intended examination of such assignor must be given. But it is now settled that the person transferring a promissory note is not the assignor of a thing in action within the meaning of section 399. (*Porter* v. *Potter* 18 N. Y., 52), and that it is only in cases where such assignor is to be examined against an assignee, or an executor or administrator, that notice of his intended examination is required to be given. (*Varlear* v. *Livingston*, 3 Kern. 248; *Bidwell* v. *The Astor Mutual Insurance Company*, 16 N. Y., 263.) The witness, therefore, not being the assignor of the plaintiff, or if he was, the defendant not being an assignee, or an executor or administrator, no notice of his

intended examination was necessary. He was a competent witness for the plaintiff without any notice; and whether the one attempted to be served was defective in the particular suggested or not was entirely immaterial.

2. A witness by the name of Estes detailed the particulars of an interview between the defendant and Brown at Brown's office, about the first of October, 1851, some two months before the transfer of the notes. The parties were trying to settle. The account books of Brown were produced and his account with the defendant looked over and examined as his book exhibited it. The defendant claimed against Brown $75 for political services, in promoting his election to the office of district attorney, and that of his brother John to the office of sheriff, and this was all the claim he made. *Estes* further testified: "I recollect defendant said Brown's account was all right, and he would allow it, if Brown would allow his." This evidence was objected to by the defendant for the reason that the parties were negotiating a settlement; but the objection was overruled and the evidence received; it was not objectionable, at least for the reason assigned. The fact that the parties were attempting to settle was no ground for excluding any admission by the defendant of the correctness of Brown's account against him. It was not an offer or proposition made for the purpose of effecting a settlement, but the declaration of a fact after looking over the items, viz.: that "Brown's account was *all* right." The admissions of distinct facts during negotiation for a settlement are always competent evidence against the party making them. In this case the proof was extremely pertinent, as a distinct admission that all the items of account then looked over were correct; and also, as tending to show that the defendant, then (some two months before the commencement of the action) made no claim or pretense that he had paid anything on the notes in suit, or that he had any set-off or claim against Brown, not credited on Brown's books, except the claim for political services.

3. At the close of the examination of Estes and Brown, the plaintiff offered Brown's book containing the accounts looked over and examined by defendant as testified to by both those witnesses, not as evidence of any items not proved, but to identify the accounts, and as confirmatory testimony. This book had been in court and referred to on the examination of both Brown and Estes. The defendant objected to it as being incompetent and immaterial, and not being proved according to the rules of evidence, and that the admissions in reference to it were made during an effort to settle. After receiving further proof that the book was the same produced at Brown's office, that it contained the same charges, and were all correct and were all looked over by the defendant, and there had been no alteration in the account since such examination, the referee overruled the objections, and decided to receive the book for the purposes offered. This was not error. The book had been looked over by the defendant and the accounts admitted to be correct, on which were all the credits of the defendant, which he claimed except for pretended political services. It showed a balance due to Brown over and above the notes in suit, as Brown had previously testified was the fact, of $50.56; but what these items were that went to make up such account, and which the defendant admitted was all right, could not be understood by the referee except by an inspection of the book. It was not offered as any evidence of itself, of the correctness of its contents, but to show what were the items of account referred to in the testimony of Estes and Brown. It is to be observed that the evidence as to the state of the accounts between Brown and defendant in October, 1851, was principally pertinent as bearing on the question, whether at the time of the transfer of the notes, Brown had not an unsettled account against the defendant for professional services, more than enough to balance any claims of the latter against him, and which could be the subject of a set-off.

4. The evidence tended to show that the note against Huntington, was by agreement, received by Brown from the defendant toward costs due him from the latter in the Angell

chancery suit, and that Brown was to make that application of a portion of its proceeds. With the view of showing the application of the note on these costs, the plaintiff offered Brown's chancery register in evidence. It was objected to for the same reason as his account book before mentioned. I think the evidence was admissible, but if otherwise, it could not possibly have prejudiced the defendant. Brown had previously testified to the application by him of enough of the note to satisfy the bill of costs in the Angell suit, and the entry in his chancery register of the fact had been proved without objection.

5. The case states that before the termination of the trial, the plaintiff offered in evidence all the papers, receipts and bills of costs before proved and marked by the referee, and that the defendant objected to them, on the ground that they were incompetent and immaterial evidence, and the acts and declarations of third persons. There was no force in the objection. There were receipts for money which Brown testified he paid for the defendant, and his bills of costs against him. After the bills of costs were proved without objection, they were properly produced and put in evidence. Had they been received as proof of the services, and the value, from the amount at which they were taxed, without other proof, there might have been some ground for the objection; but after proof of the services, and the value, and taxation, and the charges on the account book of such bills, and credits to the defendant of the amount belonging to him, and his declaration that the account was all right, it cannot be pretended that it was illegal to produce the bills as taxed.

6. It is insisted that the referee erred in receiving the evidence of the witness, John Brown, to contradict that of the defendant's witness, Philip G. Schermerhorn. But a complete answer to the point, is that Brown's testimony was received without objection. When the plaintiff first proposed to show by Brown, a conversation with Schermerhorn, with a view of impeaching or discrediting his testimony, the defendant objected on the ground that Schermerhorn's attention had not been called to the alleged conversation, or the

time or place of it; and the objection was sustained. At a subsequent stage of the trial Brown was recalled by the plaintiff, and testified to a conversation with Schermerhorn the fall before the trial, in which the latter stated in substance, that he had never heard any conversation between Elijah Brown and the defendant, and should not swear to any; that he was not a witness in the case, nor did he know anything about it. It was this evidence to which no objection was made by the defendant, that is now claimed, the referee wrongly received. Not having objected, but on the contrary consented to its being given, it is quite too late, on appeal, for the defendant to allege its reception as a ground of error.

These were all the rulings on the trial now claimed to have been erroneous. I am of the opinion that the defendant's exceptions to them were not well taken. The judgment of the Supreme Court should be affirmed.

All concurring,

Judgment affirmed.

JEREMIAH S. HAKES v. JOHN M. PECK.

Where a party purchases a tract of land at a price named, and pays for the same in a city lot, stipulating that said lot shall sell within one year at that price or over, and in case of its not selling for that amount he will make up the deficiency in cash, etc., the other party is at liberty to sell said lot at public auction at any time during the year, and if it does not bring the price stipulated the party will be liable for the deficiency.

THE plaintiff sold to the defendant a tract of land for $1,500, and received in payment therefor lot number ten, on a map of lands made for S. Cowell, lying on River street, in the city of Troy, valued at the same sum. The defendant at the time of sale signed a written agreement by which he stipulated that the said lot should sell within one year at that price or over, and in case of its not selling for that amount that he would make up the deficiency in cash to said Hakes, within sixty days, with interest after such sale. This agreement was dated 21st October, 1854. The deeds were executed at the same time. The plaintiff held the lot until 15th of June, 1855, when he sold the same at public auction in Troy, for $1,250. Public notice was given of the sale by advertisements, which were posted about the city. Notice was given of the sale to Peck. He was at the place of sale a short time before it took place.

Evidence was given on the part of the plaintiff to show that the lot had depreciated in value from October, 1854, to the time of sale, and till October, 1855. To this evidence the defendant objected, and his objection being overruled he excepted.

The defendant's counsel moved for a dismissal of the complaint on the ground that no breach of the contract was proved, and that no cause of action had accrued at the time of the commencement of the action. The court denied the motion, to which the defendant excepted. The court decided that the plaintiff was entitled to recover and directed the jury to find a verdict for the plaintiff, to which the defendant's counsel excepted. The exceptions were directed to be heard

at a General Term in the first instance. Judgment was ordered for the plaintiff.

John H. Reynolds, for the appellant.

J. A. Millard, for the respondent.

INGRAHAM, J. The principal question in this case depends upon the construction of the agreement between the parties, by which the defendant undertook to make up the deficiency if the lot did not within a year bring $1,500. The defendant contends that he had a right at any time within the year to find a purchaser at that sum, and that the sale by the plaintiff before the year expired put it out of the power of the defendant to fulfill his agreement. I do not see anything in the contract that rendered it necessary for Hakes to hold the title to the lot for the year. The agreement was that it should sell for $1,500 within one year, and if after Hakes had sold the lot the purchaser had resold it within the year for $1,500, that would have been a defense to this action. Nor is there anything requiring the offer of $1,500 from a purchaser to be made to Hakes. A like offer made in good faith to the purchaser, even if refused by him, would have shown the value to be $1,500 within the year, and an offer to the purchaser would have been as effective to fix the value as a like offer would have been if made to the plaintiff.

The proper construction of this agreement is, that Hakes should ascertain the value by a sale some time within the year and that he should not hold the lot longer than that time, and afterward by selling it for a less sum than $1,500, charge him with the deficiency. The contract clearly contemplated a sale within the year. If the defendant is right in his construction, there could be no sale within the year for less than $1,500. But if so how could there be a deficiency made, or how could the amount of deficiency be ascertained? Not before the year expired, because if so the defendant's claim to have the whole year to find a purchaser would fail. If after the year, that would be contrary to the contract which provided for paying any deficiency within the year. The

construction put upon the contract in the court below was the correct one, viz.: that if the plaintiff chose to sell the lot within the ensuing year it would bring $1,500, and if it did not the defendant would make up the deficiency between that sum and the amount the lot should bring if sold within the year. Suppose the plaintiff had not offered the lot for sale within the year, could he have maintained any action against the defendant? I think not. The contract evidently means that the plaintiff should act in good faith in selling at a reasonable time and using proper means to get a fair price. If after so doing, the property does not bring the sum agreed on, the defendant became liable to pay the difference.

There was an exception to the admission of the evidence showing the market value of the lot during the year. This point has not been taken before us on the argument. The evidence was clearly admissible, if for no other purpose to show good faith on the part of the plaintiff in making the sale, and that the defendant was not injured by selling it within and before the termination of the year.

The judgment was right, and should be affirmed.

JOHNSON, J. The plaintiff received the lot of land in question, of the defendant, at a valuation of $1,500, with a stipulation from the latter that "said lot shall sell within one year at that price or over, and in case of its not selling for that amount I will make up the deficiency in cash to said Hakes within sixty days, with interest after said sale." The stipulation is dated the 21st of October, 1854. The plaintiff sold the land at public auction June 18, 1855, for $1,250, which was the highest sum bid. The action is for the deficiency. The stipulation plainly contemplates a sale by the plaintiff of the premises, for the purpose of converting the same into money within the year ensuing its date, and provides for the payment of any deficiency in case there should be any upon such sale. The sale was of course to be made by the plaintiff, as he was the sole owner and at liberty to sell or retain the premises at his option. If he elected to keep the lot, it

operated as a satisfaction of the $1,500, at which it was valued. If he elected to sell, the stipulation provided that it should bring $1,500 or over, upon such sale, within the year, or the deficiency should be paid with interest from the date of the sale.

The only question in the case is, at what time within the year could the plaintiff sell and hold the defendant to his stipulation? The answer seems to me very plain. No time of sale is fixed by the instrument except "within one year." And as it is left optional with the plaintiff to sell or not, as he might choose, it follows, I think, very clearly, that he was to be at liberty to sell at any time within the year when it might be desirable on his part to convert the land into money. Of course, there was an implied obligation on the part of the plaintiff to act in good faith, and obtain the best price which could be obtained with reasonable exertion. There is no pretense that this has not been done. The defendant had notice of the sale, and was present, but did not offer to take the lot at the $1,500, or any other price. He certainly had then a fair opportunity of canceling his obligation by taking the lot off the plaintiff's hands. This he declined or neglected to do. It is claimed on behalf of the defendant that he had the whole of the year within which to make the required sum by a sale of the lot, and that he was to be the actor, and the plaintiff had no right to sell until the last day of the year. But this is a mistake. The plaintiff was to be the actor. He could sell or not as he chose. If he sold, it was to be at the defendant's risk as to price, and this right he has exercised within the general limit. Clearly the defendant had no power to sell, or to control the plaintiff as to time within the general scope He might have found a purchaser for the plaintiff had he chosen so to do at the valuation, or offered to take the land at that price himself, at any time before the plaintiff elected to sell, or at the time of the sale, and thus have absolved himself from his obligation. But he could not lie still, and compel the plaintiff to keep the land through the year, as that was no part of the stipulation. The meaning of the

agreement is that the lot should sell at any time within the year at which the plaintiff might in good faith desire and elect to sell, for the valuation or over. As it was sold for less, at a fair sale, within the time, the defendant is liable for the deficiency with interest.

The judgment of the Supreme Court is right, and should be affirmed.

All concur except DENIO, Ch. J., and SELDEN, J., who dissent.

Judgment affirmed.

JAMES S. CARPENTIER v. JAMES S. WILLET, Administrator of James C. Willet, sheriff, deceased.

Where a judgment is rendered in a case where the defendant is subject to an arrest and imprisonment, it should be so stated in the judgment, if the plaintiff wishes to avail himself of such remedy.

The subsequent indorsement by the justice that execution against the body is to issue, is not sufficient. Such entry, to be available, must be entered in and become a part of the judgment.

The sheriff when sued for an escape may avail himself of the defense, that the defendant was not subject to arrest on the execution.

THE action was for the escape of one Doughty, who was committed to the custody of the late James C. Willett, sheriff of New York, under an execution issuing out of the third district court of the city.

On the trial it appeared, that on the 12th November, 1857, the plaintiff recovered judgment against Samuel H. Doughty for $267.50, in the third district court of the city of New York. The plaintiff sued as the assignee of one Thomas France, and stated the following cause of action: On the 2d May, 1857, Doughty held a judgment against Alfred S. Bates and Thomas France, amounting on that day to $369.18. France paid Doughty $100 in cash thereon, and delivered to him as collateral security for the balance, $269.18, and interest to grow due thereon, and costs, three promissory notes not due, against third parties, one for the sum of $159.41; another for $232.28; and another for $212.50. About the same time, France sold and assigned to the plaintiff the promissory notes so delivered to Doughty, subject only to the claim of the latter, for the sum of $269.18, residue of his judgment, with interest and costs. Upon the notes becoming due, they were paid to Doughty in full; after such payment the plaintiff applied to Doughty for the promissory notes, or for the payment to him of the balance of their proceeds (about $300) after deducting the amount due to Doughty; but Doughty refused to deliver to him the promissory notes or either of them, or to pay to him the proceeds of said notes, or any part thereof. Doughty appeared in the action and answered. The cause

was tried, and, as stated, on 12th November, 1857, the justice rendered judgment for plaintiff for $250 damages, the extent of his jurisdiction, and $17.50 costs. On the 13th November, 1857, the justice, on an affidavit of the plaintiff, ordered an execution to issue against Doughty's body; and, on 15th November, execution was issued accordingly, and Doughty was arrested and delivered into the custody of the sheriff. On the 18th November, the sheriff took from Doughty, and sureties, a bond for the liberties established for the jail of the city and county of New York. On the evening of the 21st November, at about 7 o'clock, Doughty was seen by France, at his home in Hudson City, in the State of New Jersey; about 8 o'clock of the same evening, France informed the plaintiff of the fact; and the latter immediately made out the summons in this suit, and a copy, and delivered them to France, to be served, and France duly served the summons on the defendant about 11 o'clock of the same evening.

On the 19th November, 1857, Doughty appealed to the Common Pleas from the judgment of the district court. On that day, he served upon the justice a notice of appeal, and the undertaking required by law, which was approved by the justice, and at the same time paid the costs, and also the fee for return. It was not stated in the judgment of the justice, that the defendant was subject to arrest thereon.

At the close of the testimony, the defendant moved for a nonsuit on the following grounds: 1st. That no judgment has been produced or shown by the plaintiff, authorizing the arrest of Doughty. 2d. That the execution is wholly void, and the defendant was not bound to keep the prisoner. 3d. That no escape is shown to have existed at the time of service of the process on the sheriff. 4th. That the appeal and undertaking, and approval thereon, suspended or superseded the right to detain the defendant, Doughty, in custody.

The court granted the motion, and ordered a dismissal of the complaint, to which decision the plaintiff excepted.

Judgment having been entered accordingly against the plaintiff he appealed to the General Term, where the same was affirmed; and he now appeals to this court.

J. K. Porter, for the plaintiff.

A. J. Vanderpoel, for the defendant.

WRIGHT, J. If the process by virtue of which Doughty was arrested and imprisoned was void, an action for his escape could not be supported. That the process is void is a defense to the sheriff, upon the principle that having no right to detain the defendant, the creditor has lost nothing by the escape. (*Phelps* v. *Barton*, 13 Wend., 18; *Horton* v. *Hendershot*, 1 Hill, 118; *Albro* v. *Ward*, 8 Mass., 79; *Constant* v. *Chapman*, 2 Queen's Bench, 771.) The question, therefore, is, was the execution by which Doughty was taken issued with or without authority? If unauthorized he was not legally in custody, and the plaintiff cannot complain that the officer suffered one unlawfully detained to escape.

The execution by which he was arrested, and committed to the custody of the defendant, as sheriff of New York, issued out of the third district court of the city. On the 15th of September, 1857, the plaintiff, as assignee of one Thomas France, brought a suit against Doughty in the district court. After successive adjournments, the cause was tried, and on the 12th November, 1857, the justice rendered judgment against the defendant for $250, damages, and $17.50, costs, and the same was entered on the docket. It was not stated in this judgment that the defendant was subject to arrest and imprisonment thereon. The day following the rendition of the judgment, the plaintiff made affidavit "that judgment has been rendered for the plaintiff," etc., and on that affidavit the justice indorsed "execution against the body to issue, Wm. B. Meech, Justice, November 13th, 1857." The clerk noted in the docket this order of the justice, and issued execution accordingly, to a constable who made the arrest. The proceeding is claimed to be without legal justification, and I think rightly.

The act of April, 1857, entitled "An act to reduce the several acts relating to the district courts in the city of New York into one act," provides as follows: "When a judgment is rendered in a case where the defendant is subject to arrest

and imprisonment thereon, it must be so stated in the judgment and entered in the docket." (Laws of 1857, chap. 344, § 50.) This means that the justice must adjudge that it is a case in which the party is subject to arrest, and the right to arrest must be stated *in* the judgment; in other words, form a part thereof. It is a part of his judicial labor and duty. The provision cannot be regarded as merely directory as to the mode of proceeding or preserving the records of the district court, the duty being judicial in its nature. The statute requiring the act to be done is imperative. (*Brackett* v. *Eastman*, 17 Wend., 32; *Seiby* v. *Howard*, 3 Denio, 72.) It is a limitation of jurisdiction, and not a statutory direction to the officers of the court. If the provision related exclusively to the ministerial act of making an entry in the docket (which in this case was to be done by the clerk), it would be otherwise. It was no part of the judgment rendered on the 12th November, that Doughty was subject to arrest and imprisonment. The right to arrest was not passed upon by the justice. However, the day following the rendition of the judgment, on an affidavit of the plaintiff that Doughty had received the money for which the judgment was obtained in a fiduciary capacity, the justice ordered execution to issue against his person. This subsequent proceeding cannot be supported. On the 13th November the justice had no jurisdiction to act. He was *functus officio*. What he did was not merely irregular, but void. He had no more right to order an execution to issue against the person on the day after he had rendered judgment than he would have had three months thereafter. The district courts are of limited jurisdiction, and can only act in the mode pointed out by statute. We will look in vain for any provision in the act of 1857 remodeling these courts and their jurisdiction, for authority for this latter proceeding. There is nothing authorizing the justice to issue an execution against the person upon being satisfied by evidence after judgment and *ex parte* that the case is one for the arrest and imprisonment of the defendant. On the contrary, this feature of the non-imprisonment act of 1831 was expressly repealed as to the

district courts in New York by the district court act of 1857. (Laws of 1831, p. 413; Laws of 1857, chap. 344, § 81.) Altogether another jurisdiction was conferred. It was made as much the duty of the justice to pass upon the defendant's liability to an arrest as upon his liability in the action, and to embody his judicial conclusion in his judgment. Not having done this when the judgment was rendered, he could not afterward amend in this respect.

The district courts have no power to amend their judgments, even if the proceedings of the 13th November could be regarded as an attempt to amend. They can do nothing requiring the exercise of discretion. Having rendered judgment, from that time they are mere ministerial officers. But even if the power to amend existed, what was done the day following the rendition of the judgment was of no avail and void. The statute prescribes that the defendant may be arrested and imprisoned in certain cases, and that the right to arrest shall be stated *in* the judgment, that is, shall form a part thereof; and no other order or form of order will satisfy this requirement. When it is stated in the judgment it is the subject of review on appeal; and it is the only way in which the question may be viewed on appeal. It was manifestly intended by the provision to secure to the defendant the right of appeal from an adjudication of the inferior court involving his personal liberty. Cases are specified in the statute where the defendant is subject to arrest and imprisonment (§ 16), and if it be a case where the defendant may be arrested, the execution issued by the clerk for the enforcement of the judgment may direct the officer to arrest and commit him to the jail of the county, until he pay the judgment, or be discharged according to law. (§ 52.) This execution issues of course, and there is no provision, as in the non-imprisonment act of 1831, for ascertaining by proof *ex parte* after judgment, whether it be a case for an execution against the body; nor was any necessary. It was not left to the discretion of the justice or clerk, from which there could be no appeal, to determine upon an *ex parte* hearing after judgment, whether it was a case, under

the statute, in which an execution should go against the body. It must be determined by the judgment rendered in the action whether it be such a case, or there is no provision for determining it at all, and being made a part of the judgment, the right of appeal on this ground is secured to the defendant.

I am of the opinion, therefore, that the case was properly disposed of in the court below. Doughty was arrested and detained by void process, and no action can be maintained by the plaintiff against the defendant, as sheriff, for suffering him to escape. I believe the proposition to be universally true that whenever the process by which one is arrested is void, no action can be supported for his escape. When the process is void the creditor has no just ground of complaint that the person of his debtor is not holden in custody by it.

The judgment of the Superior Court should be affirmed.

MULLIN, J. The *ca. sa.* by virtue of which Doughty was arrested and imprisoned by the defendant was regular on its face, and therefore a protection to the officer for so arresting him. (*Hutchinson* v. *Brand*, 9 N. Y., 208; *Savacool* v. *Boughton*, 5 Wend., 170; *Chegaray* v. *Jenkins*, 5 N. Y., 376; *Noble* v. *Halliday*, 1 id., 330; *Webber* v. *Gay*, 24 Wend., 485; *People* v. *Warren*, 5 Hill, 440.)

When, however, the court or officer has not jurisdiction of the person or subject-matter, or if for any other reason the process is not irregular merely, but void, the officer is not protected, but is liable to such damages as the injured party has sustained by reason of the arrest. (*Smith* v. *Shea*, 12 Johns., 257; *Cable* v. *Cooper*, 15 id., 152.)

The process in this case is, if I understand the respondent's counsel correctly, conceded to be regular on its face, but he insists that it is void, because the statute, section 50 of chapter 344 of the Laws of 1857, declares "that when a judgment is rendered in a case where the defendant is subject to arrest and imprisonment thereon, it must be so stated in the judgment and entered in the docket;" and in this case no such entry was made in the docket, nor did such statement form at any time a part of the judgment.

It was not the intention of the legislature to make the right to an execution against the body depend on the entry or non-entry in the docket of the fact that the case was one in which an execution against the body might issue. That process is given by a general law, and is not made to depend upon any condition other than that the facts make a case in which by the statute an execution against the body may issue. The right of the party in whose favor a judgment is rendered in one of these New York district courts in a case in which the opposite party may be arrested, on an execution against the body, is as perfect as it would be if the action was in a court of record. In a court of record an attorney usually issues the execution, and issues it against the body of the defeated party, at the peril, if sued, of establishing the facts which authorized the arrest.

In the statute under consideration it is not said that the execution against the body shall be void if the judgment is not entered in conformity with its provisions. The language is no more peremptory in reference to the entries in the docket than are the provisions of the Revised Statutes. (3 Rev. Stat., 5 ed., 456, § 174.) That section provides that every justice shall keep a book, in which he shall enter fifteen different matters, and amongst others the verdict of a jury and the judgment rendered. This docket is made evidence of the facts required to be entered therein. In *Hall* v. *Tuttle* (6 Hill, 38), this provision of the Revised Statutes was held directory, merely. In that case the justice had omitted to enter judgment on a verdict in his docket until some two or three days after it was rendered. On error, the judgment was held valid. (*Robbins* v. *Gorham*, 25 N. Y., 588; *Ostrander* v. *Walter*, 2 Hill, 329.) This court, in *Walrod* v. *Shuler* (2 Comst., 134), affirmed the same proposition. In *Pond* v. *Negus* (3 Mass., 230), the assessors of a school-district were directed by statute to assess the district tax within thirty days after the clerk had certified the vote raising the tax. It was held the statute was merely directory, as there were no negative words in limiting the power to make the assessments afterward. The same reason for holding a

statute directory was assigned in *The People* v. *Allen* (6 Wend., 486); *Marchant* v. *Langworthy* (6 Hill, 646); *ex parte Heath* (3 Hill, 43); *The People* v. *Holley* (12 Wend., 481); *Jackson* v. *Young* (5 Cowen, 269); *Striker* v. *Kelly* (7 Hill, 9); *The People* v. *Peck* (11 Wend., 604); *Mohawk and Hudson Railroad Company* (19 id., 143).

REDFIELD, Ch. J., in *Holland* v. *Osgood* (8 Vt., 276), says: "If the justice failed to comply with the requirements of a statute merely directory as the mode of proceeding or preserving his records, it was never held that the proceedings became *ipso facto* void. Statutes directing the mode of proceeding by public officers have always been treated as advisory, and not intended to invalidate the vitality of the proceedings themselves unless expressly so declared.

There is a propriety in requiring the entry in the judgment on the docket, whether the case is one on which an execution against the body may issue. The act of 1857, cited *supra*, provides for the appointment of a clerk to each of the district courts created by that act, and makes it the duty of such clerk to keep a docket, and to enter therein the several matters specified in the statutes. The clerk also issues the execution, and unless he has some means of being informed whether the case is one in which an execution may go against the body, he would be incurring great risk in issuing, as well as in refusing to issue, such process. The justice holding the court is the only person from whom he can safely receive directions, and to prevent mistakes through forgetfulness or other cause, it is required that fact shall be entered in the judgment. The requirement is obviously for the benefit and protection of the clerk. The right of the party to it is not dependent on the entry, and this provision was not designed to confer or qualify such right. But it is argued that it is a part of the justice's judicial duty to determine whether the case is one in which an execution against the body may issue, and that the directions to which reference has been made hold that making entries in a docket do not apply to these cases. Those cases consider the statute directory because the

act is ministerial; this act is judicial, and is not therefore within the principle of those cases.

I think the decision of the question is a judicial act. But I do not think that the statute is any the less a directory one on that account. The form of the execution is not any part of the merits of the controversy between the parties. A decision upon it is the decision of a question collateral to the merits and not intended to affect them, but is for the protection of an officer of the court.

It seems to me the clerk had the right to issue an execution against the body at the risk of proving, in an action for false imprisonment, that the case was one in which such an execution might issue.

Had the statute made the entry in the judgment that "*the case was one in which an execution against the body could issue*" a condition precedent to the right to such process, no doubt would have existed as to the correctness of the ruling of the court below. But the law imposes no such condition, the right to an execution against the body in an action for the conversion of personal property is as perfect in one of the district courts as it is in the Supreme Court, and it should not be deemed to be taken away unless by an express enactment.

It is said that although the action against Doughty was trover, yet it does not follow that an unlawful conversion was proved, and that it may have been that the justice rendered judgment for the plaintiff in that action on the ground that the defendant was indebted to him in the amount named in the judgment, and that the fair inference from the facts is that the justice must have deemed the case one in which an execution against the body could not issue, otherwise he would have incorporated in the judgment the decision that such an execution could issue.

The sheriff cannot go behind the judgment and inquire whether the proceedings were or were not regular. The judgment concludes him as well as the defendant against whom it is rendered. But he may show, when sued for an escape, that the defendant named in the process was not

liable to arrest. (*Phelps* v. *Barton*, 13 Wend., 68; *Ray* v. *Hogeboom*, 11 Johns., 433.)

On the proof in this case the appropriation of the proceeds of the notes was fully established. The notes and their proceeds were assigned to the plaintiff, subject to the lien of Doughty, for some $211. They were for a much larger sum than the lien, and they were admitted to have been fully paid to Doughty. A demand was made by the plaintiff of the balance in Doughty's hands, and refused. The question is whether on this state of facts a case was made that entitled the plaintiff to an execution against the body?

Doughty had a right to receive pay on the notes, and on payment to surrender them to the parties entitled. There could not be a conversion therefore of the notes. (*Weymouth* v. *Boyer*, 1 Vesey, Jr., 424; Paley's Agency, 79, 80, and cases cited.) Nor would the action of trover lie for the excess of the proceeds after paying Doughty's claim thereon. (*Orton* v. *Butler*, 5 B. & Ald., 652.) Trover originally lay for the recovery of property lost by the plaintiff and found by the defendant and converted by him to his own use. After a while the loss and finding were treated as mere fictions, and the plaintiff was entitled to recover damages for the unlawful taking or detention of personal property of which he was owner, or to the possession of which he was entitled. To maintain the action, therefore, there must be some specific property to which the plaintiff can establish a present right of possession. It is not enough that there is some property in the possession of the defendant to which plaintiff is entitled, but he must on his declaration or complaint designate the property, so that it can be ascertained and its value estimated. (*Pettit* v. *Bouser*, 1 Miss., 64.) It is not essential that the plaintiff should be able to describe the property with much particularity, but enough must be alleged to distinguish it. (1 Chitty's Pl., 363-365; 2 id., 369, 370.) When the property sued for is bank-bills, it is a sufficient description to say so many bills of a bank, naming it, of such and such denominations. (*Dows* v. *Reynoll*, Lalor's Supp't, 407.) Where

it is coin that is claimed, it may be described by saying so many dollars, or half dollars, in a keg, box or other package. (Comyn's Digest, Title, Action on the Law on Trover, C.)

In this case the money received on the notes is not described in any manner. But the plaintiff was not entitled to any particular bills or number of coin. Any description of money which could be used in payment of a debt would have satisfied plaintiff's claim. There was, therefore, no specific money that could be claimed by the plaintiff. (*Orton* v. *Butler* 5 B. & Ald., 652.) Again, it was received by the defendant as plaintiff's agent, and he was bound to account for it as so much money had and received to plaintiff's use. Assumpsit and not trover was the proper form of action in which to recover the money held by Doughty.

I am, therefore, of the opinion that Doughty was not liable to be arrested, and that the sheriff had the right to let him go at large and was not liable for his escape.

The judgment should, therefore, be affirmed, with costs.

All concur with WRIGHT, J., except HOGEBOOM, J., who did not vote.

Affirmed.

ELIZABETH ANN WILCKENS and others, Executors of, etc., of Jacob Wickelhausen, deceased, Appellants, v. JAMES S. WILLET, Administrator, etc., of James C. Willet, deceased, Respondent.

If a person admitted to the liberties of the jail limits is without such limits by virtue of a valid legal process which affords justification to the officer taking him thence, it is not to be deemed an escape within the meaning of the statute.

When a person confined on the limits of a jail within this State is taken by virtue of the warrant of the speaker of the house of representatives to Washington to answer for a contempt in not appearing before a committee of the house when duly summoned, it is not an escape from such limits.

To constitute an escape there must be some agency of the prisoner, or some wrongful act by a third person, against whom the law gives a remedy.

JOHNSON, J. John D. Williamson, for whose alleged escape this action was brought, was imprisoned upon an execution duly issued against his person in the city of New York, and had secured the right of the jail liberties. While thus situated he was served with a subpœna in due form of law to attend and give evidence before the house of representatives of the United States congress, or a committee thereof, and failing to appear was adjudged guilty of a contempt. A warrant in the customary form was thereupon issued and delivered to the sergeant-at-arms, to arrest said Williamson and bring him before the said house, at the bar thereof, to answer to the said charge of contempt, and to be dealt with according to the Constitution and laws of the United States.

In pursuance of this warrant the sergeant-at-arms, on the 2d of February, 1858, arrested said Williamson within the jail liberties, and took him, and compelled him to go to Washington, under and by virtue of the said warrant and before the bar of said house. He was detained upon said process until the 9th of the same month, when he returned to the liberties of the said jail. This action was commenced against the sheriff on the 5th of February, and before the return of said prisoner.

Was this an escape for which the sheriff was liable?

Our statute (2 R. S., 437, § 63) provides, that if any prisoner committed to any jail on execution in a civil action, or upon an attachment, for the non-payment of costs, shall go or be at large without the boundaries of the liberties of such jail without the assent of the party at whose suit such prisoner was committed, the same shall be deemed an escape of such prisoner, and the sheriff having charge of such jail shall be answerable therefor to such party for the debt, damages or sum of money for which such prisoner was committed. This section contains in terms no exception whatever in favor of any cause of the prisoner's being thus at large. His going or being at large without the boundaries of the liberties "shall be deemed an escape," and the sheriff shall be liable. Such is the plain reading of the section, and, if no exceptions are to be implied, but the language is to be held to apply to any and every going or being thus at large, whether voluntary or involuntary on the part of the prisoner or the sheriff, this action must be regarded as well brought and the plaintiff entitled to recover, without reference to the question of the authority of the speaker's warrant, and of the officer by whom the prisoner in question was taken without the boundaries of the jail liberties in this case, and upon which this action is founded. Section 61 of the same article of the Revised Statutes provides that all persons committed to any jail upon any process for contempt, or committed for misconduct, in the cases prescribed by law, shall be actually confined and detained within the jail until they shall be discharged by due course of law. It then provides that if any sheriff or keeper of a jail shall permit or suffer "*any prisoner so committed*" to such jail to go or be at large out of his prison, "except by virtue of some writ of *habeas corpus* or rule of court, or in such other cases as may be provided by law," shall be liable to the party aggrieved for his damages sustained thereby. The exception here prescribed does not, it will be seen, embrace the case of a person committed, as was the prisoner in question, upon execution, and duly admitted to the liberties of the jail, but is expressly

limited to the case of "*prisoners so committed*," *i. e.*, upon process for contempts or for misconduct. But although the exception specified in section 61 does not by its terms or intention reach the case of the prisoner in question, it furnishes, I think, an unmistakable key to the true reading and interpretation of section 63, and shows that the going or being without the liberties of the jail provided for by that section, which was to be deemed an escape, was by the act, and upon the volition of the prisoner, and not upon the compulsion of judicial process.

The object plainly was not to favor sheriffs holding prisoners of this class committed for contempts and misconduct in reference to escapes, but to place them upon the same legal footing in regard to escapes from the jail by such prisoners as that in which they stood in respect to escapes by prisoners committed on execution in a civil action. If the prisoner is without the liberties by virtue of a valid legal process, which affords a complete justification to the officer having him thus without, in charge, it is not deemed an escape, and no action lies against the sheriff. The general rule at common law seems to have been, that nothing but the act of God or the king's enemies would excuse the sheriff for an escape from prison by a prisoner committed on execution. This was declared to be the rule by Lord LOUGHBOROUGH, in *Alsept* v. *Eyles* (2 H. Bl., 113).

If the jail took fire, and the prisoners by means thereof escaped, the sheriff was excused if the fire was the act of God. (Bac. Abr., Title, Escape in Civil Cases, H.) And in Southcote's Case, 4 Co., 84, it is laid down as the rule that "if traitors break a prison, it shall not discharge the jailer; otherwise if the king's enemies of another kingdom; for in the one case he may have his remedy and recompense, and in the other case not." The reason here given why the jailer should not be liable in case the prison was broken by the king's enemies of another kingdom, shows the cogency and soundness of the exception to the general rule of the common law, which I regard as well established in favor of sheriffs, where the prisoner is without the prison, or jail liberties, by virtue

of some order of a court or officer of competent jurisdiction, or of some legal process which affords a justification to the officer executing it, and against whom the sheriff can have no "remedy and recompense." It has long been settled, both here and in England, that taking a prisoner, who was imprisoned on execution in a civil suit, away from the prison or the jail liberties on a *habeas corpus ad testificandum*, to testify, was no escape. (*Noble* v. *Smith*, 5 Johns., 357; *Hassam* v. *Griffin*, 18 id., 48; *Wattles* v. *Marsh*, 5 Cowen, 176; *Martin* v. *Wood*, 7 Wend., 132; 3 Esp. Cas., 283; 3 Burr., 1440; 4 East, 587.) And so when the prisoner has been discharged from his imprisonment, by the order of a court or judicial officer, it has been held a good defense for the sheriff, in an action for the escape, provided the court or officer making the order had jurisdiction to make it, even though such order was erroneously made, and might be avoided. (*Cautillon* v. *Graves*, 8 Johns., 369; *Hart* v. *Dubois*, 20 Wend., 236.) Otherwise, however, where the order is void upon its face, or is granted by an officer who has no jurisdiction in the matter. (*Bush* v. *Pattibone*, 4 Comst., 300; *Cobb* v. *Cooper*, 15 Johns., 152.) In *Field* v. *Jones* (9 East, 151), the prisoner had signed his petition for the benefit of the day-rule, but left the King's Bench prison before the sitting of the court on the day on which the rule was granted. The rule was granted in his favor upon the sitting of the court on that day, but not until after the action for the escape was commenced against the marshal. But the rule was held to cover the entire day when granted and to be a justification to the marshal in the action. It is clearly enough to justify the sheriff to show that the absence of the prisoner is in pursuance of lawful authority.

To constitute an escape there must be some agency of the prisoner employed, or some wrongful act by another against whom the law gives a remedy. (Allen on Sheriffs, 231; *Baxter* v. *Tabor*, 4 Mass., 361; *Cargill* v. *Taylor*, 10 id., 206.) Wherever the principal, by the act of God or of the law, is taken out of the bail's keeping, as it were, before the

day of surrender and without fault in the bail they are discharged. (5 Dane Abr., 290; *Way* v. *Wright*, 5 Metc., 380; *Fuller* v. *Davis*, 1 Gray, 612.) And it has been held that a person privileged from arrest, may leave the jail without the sheriff being liable for an escape. (*Ray* v. *Hogeboom*, 11 Johns., 433.) And so where he has been released by act of the legislature. (*Mason* v. *Haille*, 12 Whart., 370.) These cases, and many more which might be cited, show clearly, that the act of the law, as well as the act of God, or of the public enemies, will excuse the sheriff in an action for an escape; and that absence from the jail, or the jail liberties, by such means or from such causes, by the prisoner, are not within the contemplation of the statute, and are not the going or being at large, referred to in section 63.

The question then arises whether the prisoner in this case was removed from the jail liberties to Washington by authority of law or legal process. This authority must, I apprehend, be paramount to that under which the person so removed is held, in order to justify the removal, or, at all events, of such a nature that the officer or person effecting the removal could justify under it in case of an action brought against him by the sheriff for taking his prisoner out of his custody. Any extended examination of the question of the general power of the house of representatives of the United States congress to subpœna witnesses to testify before it or before one of its committees, and to compel their attendance from any portion of the territorial limits of the United States, is rendered unnecessary in this case by the full and unreserved concession of the learned counsel for the plaintiff of the existence of such a power in that body. That the power exists there admits of no doubt whatever. It is a necessary incident to the sovereign power of making laws; and its exercise is often indispensable to the great end of enlightened, judicious and wholesome legislation. The power is rather judicial in its nature, but in a legislative body exists as an auxiliary to the legislative power only. In the earlier history of the country, from which our institutions both of law and legislation are principally derived, judicial and legislative

functions existed in and were exercised by the same body. And when they were afterward separated, and each came to be exercised by a separate tribunal or body, the legislative body necessarily retained a sufficient amount of the judicial power to enable it to investigate fully and to comprehend thoroughly, any and every subject upon which the body proposed to act in its legislative capacity. This included the power to subpœna witnesses to give evidence, to compel them to attend and testify, and to punish for disobedience and contempt in refusing to attend, or in refusing to testify upon attendance. The power to punish for disobedience and contempt is a necessary incident to the power to require and compel attendance. This is not denied by the plaintiff's counsel. He contends, however, that the only way in which the attendance of Williamson before the house of representatives could have been lawfully enforced and secured was by *habeas corpus*, to testify, or to answer for the contempt. This is unquestionably the mode provided by law, where a witness imprisoned on civil execution is required to give evidence before a court or to answer there for a contempt. Our statute (2 R. S., 559, sections 1 to 5, inclusive) provides for such cases, where the person is brought up on such process, either to testify or to answer for a contempt. The prisoner is to be remanded after having testified, and if any order of commitment is made against him it must be to the prison from which he was taken. (*The People* v. *Rogers*, 2 Paige, 103.)

The statute, however, only relates to actions and proceedings in courts, and not to proceedings before legislative bodies. In regard to those bodies, if their practice is not regulated by any statute, they are to proceed according to their customary rules and practice. It is not denied in this case, that Williamson, the prisoner, was taken before the house of representatives on the occasion in question, upon the regular and customary process used by that body to bring prisoners to its bar who had refused to obey the subpœna to appear and testify, and had been adjudged in contempt, for which they are required to answer. The warrant issued

gave the sergeant-at-arms the right to take the person of Williamson into his custody, and convey him to Washington, to answer and purge his contempt if he could. It cannot be denied, I think, that while he was thus in the custody of the sergeant-at-arms, under this warrant, and while he was before the house, until his discharge, he was in the custody of the law. The question then arises, whether he was at large during this time within the meaning and intention of the statute, so as to constitute an escape. I am clearly of the opinion that he was not. He was without the jail, and the jail liberties, it is true, but he was still in the custody of the law, and was absent for a cause or purpose for which the policy of the law allows prisoners to be absent temporarily, provided they are still in the custody of the law. It was no more an escape than it would have been had the prisoner been without the liberties on *habeas corpus*. The law allows a creditor, in certain cases, to confine the person of his debtor within the jail, or the jail liberties, in order to coerce him into paying the debts. But it does not allow him to continue that confinement at the particular place to the obstruction of the due course of justice in other cases. He may be taken to other places to give evidence, or to answer for his contempt, and so long as he is kept for this purpose by judicial process, and is not given his liberty to go as he will, it is no escape. The prisoner in question was taken to Washington for a legitimate object. He must be deemed to have been a material witness before the house of representatives, and that body had power to compel his attendance, and to punish him as for a contempt, in case of his neglect or refusal to attend and testify. They had jurisdiction in the premises, and issued their customary warrant. The prisoner was arrested and taken away and detained under it. The plaintiff's counsel concedes that the prisoner might have been lawfully taken on a *habeas corpus*, but insists that inasmuch as he was taken on a different process, though for a legitimate purpose, he was unlawfully without the limits as respects the plaintiff. But it is clear that the prisoner himself could not resist the sergeant-at-arms with

his warrant. He was obliged to go in the custody of that officer. True, he might purge or excuse the alleged contempt by showing that he was imprisoned, and could not obey the subpœna, and by giving his testimony according to the requirements of the first process, but he could not refuse to attend according to the exigency of the warrant. Nor do I think the sheriff could have resisted the taking. The prisoner was out upon the liberties, upon bail, and not otherwise in the sheriff's custody. And suppose the sheriff had sued the sergeant-at-arms for taking the prisoner from the jail liberties, I do not see how he could have recovered. That officer could, I assume, have justified under his process. It is to be presumed that it was fair on its face, and was issued by a body having jurisdiction, and for a lawful object, even against one imprisoned.

It seems to me clear, therefore, that Williamson, the prisoner, was taken by authority of law, and in a manner which gave the sheriff no remedy or recompense against the officer taking him. It is of no consequence, as it seems to me, that the warrant was not in the form of a writ of *habeas corpus*. That is strictly a judicial writ. It is not a process which the body requiring the testimony of the witness could issue. Its process is the subpœna and the warrant, which were issued. It issued the only process it had or could issue. The house might perhaps in some form have applied to some court of competent jurisdiction, if one could be found, for a writ of *habeas corpus*, to bring the witness before it to testify or to answer for a contempt, though I think, under our complex system, some serious difficulties might have been found in the way of obtaining any such process. That seems to be the practice in England, where persons imprisoned on civil process are required as witnesses to testify before the house of commons or its committees. But there it seems to be mere matter of practice, as *in the matter of Sir Edward Price*, a prisoner (4 East, 587) who was confined in Ilchester jail by virtue of a commitment of the Court of King's Bench, for non-payment of a fine imposed as part of the judgment in a case of assault and battery. The prisoner was a material

witness upon a question before the house of commons, and the speaker had issued his warrant to bring up the witness by the day appointed. But in order to obviate any difficulty which the jailer might make to suffer the prisoner to go out of confinement without the authority of the court, application was made to the court for a *habeas corpus ad testificandum*, to bring up the prisoner before the committee of the house. The court at first entertained doubts of the propriety of such an application, of which they did not recollect any precedent, but, after some hesitation, granted the rule to show cause, and afterward, upon the applicant undertaking to be at the expense of bringing the witness up and returning him to custody, made the rule absolute.

This is understood to be the practice now in Great Britain, in cases where witnesses are required before either house of parliament who are imprisoned. But the application in that case seems to have been made for more abundant caution and to avoid all difficulty with the jailer, and not for want of power in the house of commons to bring the witness up under its warrant. It is obvious that there is far less difficulty in such a practice in England than in this country with its national and State legislatures and courts exercising separate and distinct jurisdictions. No such practice has ever, that I am aware of, been adopted in this country, and I do not regard it as a vital question in the case. If it is a mere question of practice, as I think it is, it in no respect affects the jurisdiction of the house of representatives. If that body had the right to have the prisoner before it temporarily for such a purpose, that is enough, and the mere form of the process upon which he was taken is not material, provided the object appeared substantially upon its face and it was issued by competent authority. (*Wattles* v. *Marsh, supra.*)

In the view I take of this case, it is not necessary to decide whether the congress of the United States possesses certain powers superior to State laws, by which it can override such laws, or deprive creditors of rights secured by them; I do not suppose that congress has any such right, which it can exercise arbitrarily or capriciously, or in any way, except in the

exercise of some power expressly granted by the Constitution of the United States, or of some power which belongs, as a necessary incident, to a clearly granted power. It is enough, however, for this case, to hold that either house of congress has, at least, as much right to have an imprisoned witness before it, for the purpose of giving evidence when deemed necessary, as any party can have in an action in a court of justice, and that creditors hold their imprisoned debtors subject to the right of temporary removal, for the purpose of testifying in the one case as much as in the other. I do not think a witness thus in execution could be allowed, on a mere subpœna, to leave the jail, or the jail liberties, for the purpose of giving evidence at some other place, without rendering the sheriff liable for any escape, for the plain reason that a witness out in pursuance of such a process would clearly be at large, within the meaning of the statute, not being in the custody of any officer, or of the law. The subpœna does not authorize any one to take the witness into custody, or to detain him for any purpose, and, of course, he would be at large without restraint. But not so when taken upon a *habeas corpus* to testify, or, by virtue of an attachment or a warrant, to answer for an alleged contempt. He is in the custody of the law when held for such a purpose until regularly discharged, and is not at large in that sense which is necessary to constitute an escape. Here the action was commenced while the prisoner was in custody under the speaker's warrant, and several days before he was discharged. Neither the sheriff nor his bail could have retaken him while thus held in custody, and the sheriff, most clearly, was in no respect to blame for the prisoner's absence from the jail liberties. He could not help it.

The action was therefore commenced before there was any escape, and while the prisoner was in the custody of the law, for a perfectly legitimate purpose. Having been commenced before any cause of action had accrued, the action cannot be maintained. It is in no respect material to the case whether Williamson, the prisoner, had been guilty of a contempt, or, in other words, whether he had a valid excuse for not obeying

the mandate of the subpœna. It is enough that he was charged with a contempt, and was taken into the custody of the officer of the body making the charge, on a regular process, which compelled him to appear and answer the charge. The judgment of the house on the question of contempt cannot be examined or reviewed here. It does not distinctly appear from the facts found when Williamson was released from the custody of the sergeant-at-arms, whether at Washington, or in New York, nor is it material, as the fact is found, that he was not released until the 9th of February, four days after the action had been commenced. It appears that Williamson did, in fact, as soon as he was released, return to the liberties of said jail. The question whether the release of Williamson at Washington and his voluntary return without restraint or compulsion to New York would have constituted an escape, is not presented by the facts found, and it is unnecessary to pass upon it. An escape after the action was commenced would not save it if there was no cause of action at the time of its commencement. I am of the opinion, therefore, that the judgment is right and should be affirmed.

All concur,

Judgment affirmed.

ERASTUS B. SEYMOUR *et al.*, *v.* HARRISON O. COWING *et al.*

On a trial before a jury where the court directs a verdict for the defendant, if there is any question for the jury the party should request the court to submit the same; if no such request is made the question cannot be considered on review.

Instruments not under seal may be delivered to the party to whom, upon their face, they are made payable, or who, by their terms, is entitled to some interest or benefit under them, upon a condition, the performance of which is necessary in order to perfect the title of the holder to enforce the contract.

APPEAL from an order of the Superior Court of Buffalo setting aside a verdict rendered at the trial of the same court in favor of the plaintiffs, against the defendants, Cowing and Buell, and ordering a new trial, with costs.

The action was brought on two promissory notes, made by the defendant, Cowing, payable to the order of Benson, and indorsed by him, and by Buell and Willard, partners in business at Buffalo, payable at the Bank of Attica, the one at fifteen months, for $886.72, the other for the same amount, at eighteen months from the date, and both dated the 27th October, 1856.

All the defendants except Benson answered; and the defenses were: First, a denial of all the material allegations of the complaint. Second, that said notes were made and indorsed without consideration for the accommodation of Benson, for the sole purpose of enabling him to stock his grist-mill, and with the agreement that the said notes, together with two other notes made at the same time, and for the same amount, and payable the one at nine months, the other at twelve months, should not be put into the market to be sold or otherwise negotiated at usury. In violation of such agreement the said notes were transferred by Benson to the plaintiffs upon a usurious agreement, and the proceeds applied in payment of his (Benson's) debts, and not in stocking his grist-mill. All of which matters were known to the plaintiffs. Third, that said notes were usurious and void.

On the trial the plaintiffs proved the making and indorsing of the notes, demand, protest and notice to the indorsers, and rested.

The defendants proved that the said notes were discounted by the plaintiffs at the rate of twelve per cent per annum. That Buell & Willard were partners in trade at Buffalo, and that Buell, one of said firm, solely for the accommodation of said Benson, and without the knowledge or consent of said Willard, and outside the scope of the partnership articles, indorsed said notes in the name of said firm, and of these facts the plaintiffs had notice. On the 20th October, 1856, and before the said notes were made, Benson had applied to Cowing to borrow his note for about $4,000, which Cowing declined to lend. That on the day of the date of said notes Benson again called on Cowing, and told him he could not get along without his paper, and requested him to make some notes, and proposed to leave with Cowing his (Benson's) notes, corresponding with those Cowing should let him (Benson) have, as memoranda of the transaction. Cowing told him he might do as he pleased about leaving his (Benson's) notes; that if he left them he should hold them as memoranda and would put them in his safe; that all he wanted was that he (Benson) should take up his (Cowing's) notes at maturity. That thereupon the four notes above described were made by Cowing. Thereupon Benson made four notes corresponding in amount and time and place of payment with those made by Cowing, and delivered them to Cowing, who put them in his safe, but has made no use of them. Cowing, although he keeps a bill-book, did not enter these notes in it.

The evidence being closed, the court directed a verdict in favor of the defendant Willard, and against the defendant Cowing, for the amount of said notes and interest; against the defendant Buell, for the amount paid by the plaintiff to Benson, and interest. The defendants, Cowing and Buell, separately excepted to the direction of the court.

The court ordered the exceptions to be heard in the first instance, at the General Term, and judgment in the mean time suspended.

The General Term set aside the verdict, and ordered a new trial, with costs to abide the event.

The defendants Cowing and Buell appeal to this court from the said order.

M. A. Whitney, for the appellants.

Henry W. Rogers, for the respondents.

MULLIN, J. The only question on the trial, and the only one before us for decision, is whether Cowing received the notes of Benson in exchange for the four notes delivered by him to Benson. If he did, the direction at the trial was right. If he did not—if they were received merely as memoranda of the date, amount and times of payment of the notes delivered by Cowing, then there was no exchange, and consequently no consideration for the notes in suit.

There was no conflicting evidence in regard to the arrangement concerning the notes, and the court was right, therefore, in ordering a verdict.

If the arrangement proved was susceptible of two constructions, it was for the court to construe it so as to give effect to the intention of the parties. If there was any question for the jury, it was the duty of the parties to ask that the case be submitted to the jury. No such request was made; they acquiesced in the action of the court, and they cannot now be heard to allege that there was any question withheld from the jury which should have been submitted to them.

We must treat the question as one of law, and that question is whether, on the facts proved, the agreement was one of exchange of notes, or whether it was a loan of the notes of Cowing, and Benson's were left as memoranda merely.

Before the notes in question were made, Benson applied to Cowing to borrow his notes for some $4,000, which Cowing refused to lend. The application was again renewed on the day the notes of Cowing were made, and Benson proposed to leave his notes with Cowing as memoranda of the transaction.

Cowing told him he might do as he pleased; all he wanted was that Benson should take up his (Cowing's) notes at maturity, and Benson's notes were not used by Cowing.

It is thus shown that an exchange was distinctly proposed by Benson and refused. There is not a particle of evidence to show that Cowing changed his mind. Indeed, no request was afterward made to him to exchange. The subsequent application, and the one in pursuance of which the notes of Cowing were made and delivered, was that Cowing should make his notes, and he (Benson) would deliver his as memoranda.

If, notwithstanding this arrangement, Cowing had, nevertheless, treated Benson's notes as operative securities, the judge might have found a change of purpose on the part of Cowing, or have implied a new agreement from the acts of the parties. But there is no act to justify any such inference, and any finding of fact, or any construction of the agreement by which an exchange of notes is imputed to the parties, is utterly without foundation in law or in fact.

It was competent for the parties to agree that the notes of Benson should be left with and be held by Cowing as memoranda merely. A deed, if delivered to the grantee or person entitled to take under, becomes at once absolute, whatever the intention of the parties may be. (*Arnold* v. *Patrick*, 6 Paige, 310; *Worrall* v. *Munn*, 5 N. Y., 229.) But instruments not under seal may be delivered to the party to whom upon their face they are made payable, or who is by their terms entitled to some interest or benefit under them, upon a condition the performance of which is necessary in order to perfect the title of the holder to enforce the contract. (Edwards on Bills, 186; *Miller* v. *Gombie*, 4 Barb., 146.)

Our reports are filled with cases in which, the delivery of notes and other obligations to the payee or obligee being shown to be conditional, the title of the holder was defeated.

It is said that the evidence that the notes of Benson were left as memoranda merely was incompetent because it contradicted the contract, making it inoperative, when by its terms it was an absolute engagement to pay.

The objection begs the question. Before the rule contended for can apply, it must appear that the contract was a valid agreement in the hands of Cowing. Had it been shown that the delivery was absolute, or had there been no evidence to show it conditional, the presumption of law would have been that the delivery was absolute, and in that case evidence could not be given that it was agreed between the parties differently from the terms of the contract. But until delivery the contract is wholly inoperative, and if it be shown that the instrument was delivered to take effect only on the performance of some condition, or on the happening of some future event, the contract is not operative and binding until the condition is performed or event has occurred.

Such evidence does not alter or vary the contract, when it takes effect it speaks for itself, but it prevents a delivery, which unqualifiedly would give instant effect to the agreement, from having any other or greater effect than is contemplated by the parties.

If the question as to the meaning of the contract could be treated as one of fact and not of law, the judgment of the General Term must nevertheless be affirmed. That court has power to review the findings of fact of the judge at the circuit, and this court in reviewing the judgment can only look into the case, in order to see whether there is any evidence to sustain the findings of the General Term. If there is, we must affirm the judgment. If there is none, it is our duty to reverse it.

The evidence fully justifies the action of the General Term in setting aside the verdict. If I am right in either of the foregoing positions, there was no consideration for the notes of Cowing, and a recovery thereon by the plaintiff cannot be sustained.

I discover no ambiguity in the language of the case where it says the notes were left with Cowing as memoranda. The word explains itself. Memoranda is defined by Webster to be "*notes to help the memory.*" This is a very different purpose from that of being valid contracts to pay money.

The agreement of the parties can have but one interpretation, and that is, that the notes of Benson were not delivered as binding obligations to Cowing. The notes of Cowing were, therefore, without consideration and void. The verdict was wrong. The order of the General Term, setting it aside and granting a new trial, was right, and should be affirmed; and, under the stipulation of the defendants, judgment absolute should be ordered against them, with costs.

DENIO, Ch. J. The notes in question having been negotiated to the plaintiffs at a higher rate of interest than that allowed by law, the question was, whether they were operative paper in the hands of Benson, the payee, who negotiated them at that time. If they were, he had a right to dispose of them at a discount; but if they had their legal inception only at the time of such transfer, they were infected with usury.

The plaintiffs claim that Cowing, the maker, received value at the time of signing them by taking the notes of Benson, the payee, for equal amounts, and having the same time to mature; and they seek to apply to the case the principle of *Cobb* v. *Titus* (10 N. Y., 198). But it was shown by parol evidence that Cowing became the maker of the notes simply for the accommodation of Benson, and did not consent to receive the notes of the latter by way of exchange for those signed by him. It was proved that when Benson offered to leave his notes Cowing said he might do as he pleased about it; but if he did leave them, he would hold them as memoranda of the transaction, and would put them in his safe; and that all he wanted was, that Benson should take up his (Cowing's) notes at maturity. This proof, if legal, showed that there was no consideration for the notes sued on until they were negotiated to the plaintiffs. The single question, therefore, is—if that can be said to be a question—whether the defendants were entitled to establish the circumstance stated by parol evidence. The plaintiffs insist that the fact of the exchange of the notes, and the constituting one set the consideration of the other, existed in writing. But that is a

mistake. The only writings were the notes of the respective parties. The fact alleged of their connection with each other, and that one set was the consideration of the other, was not shown by any writing. To be sure, each party had the notes of the other, and all the notes were presumed to have been given for value; but that proves nothing to the purpose. Without parol proof, each note would be taken to have been given upon a separate and independent consideration. It may be that they ought to be read together, being between the same parties, and signed at the same time; but no method of reading them would have shown anything as to their relation to each other, or have shown that one was the consideration of the other. To establish that fact the plaintiffs would themselves have to resort to the parol evidence. That evidence, when produced, completely negatived the idea of an exchange of notes. Benson's notes were not negotiated to Cowing, but were given to him to be kept as memoranda; and the consideration expressed on their face was disproved.

It follows that the defense of usury was fully made out, and that the judge should have directed a verdict for the defendants.

The order appealed from should be affirmed, and judgment final be given for the defendants, pursuant to the stipulation.

All concur,

Judgment affirmed.

WILLIAM FISH v. ISAAC JACOBSOHN.

A check on a bank imports a consideration; and the *onus* is on the party giving it, if there was none.

The party to whom the check is given is the proper party to bring the action thereon.

APPEAL from judgment of Superior Court of New York. The action was to recover the amount of a draft or check, drawn by defendant, as follows:

"NEW YORK, March 16, 1859.

"L. S. Lawrence & Co., bankers, pay to Mr. William Fish, or order, 3,000 25-100 dollars. $3,000 25-100.

"ISAAC JACOBSOHN."

Which check, the complaint averred was drawn by the defendant at the city of New Orleans on the 16th March, 1859, and delivered by him to the plaintiff, the payee named therein, in settlement of a balance of account due by Bernard Ulman, of the city of New York, for whom the defendant acted as agent, to Benjamin Lumley, of the city of London, for whom the plaintiff acted as agent, in the settlement of said account. That the check was indorsed by the plaintiff, and on the 24th March, 1859, presented to L. S. Lawrence & Co., at the city of New York, for payment, and payment thereof demanded, which was refused; the said defendant, having, prior to such presentment, forbidden the payment thereof by said drawees; of all which the defendant had notice, and the same has not since been paid.

The making of the check, the presentment thereof, and notice of the defendant of non-payment, was not denied by the answer. Three or four matters were alleged in the answer as defenses: 1st. That at the time the check was made, he (the defendant) was not in any wise indebted to the plaintiff, and that he made the check and delivered it to the plaintiff without any consideration therefor. 2d. That he made the check for an amount claimed to be due

from Ulman to Lumley, and delivered the same to the plaintiff as the agent of Lumley, and not otherwise, and not as an executor, or administrator or trustee of an express trust, and plaintiff is not authorized by any statute to sue, without joining with him the person for whose benefit the action is prosecuted. 3d. That the check was given to pay a debt claimed to be due from Ulman to Lumley, but that in fact no such debt was *then and there due.* 4th. That the check was in fact a promise by the defendant to pay a then supposed debt of Ulman to Lumley, and for which the defendant was not liable, and that there was not any other consideration for the check, or the making of said promise; and the consideration for making the check is not expressed in it, nor is any consideration expressed in it.

The action was referred to B. W. Bonney, Esq. On the trial, the plaintiff, after reading the pleadings, rested his case, and asked for judgment on the pleadings. The defendant also moved for judgment on the pleadings, on the ground, first, that the complaint did not state facts sufficient to constitute a cause of action; second, that it appeared on the face of the complaint that the check—the subject of the action—was given by the defendant to the plaintiff without consideration. The referee denied the motion, and the defendant excepted. The defendant was then offered as a witness on his own behalf, to establish the defense set up in the answer; the plaintiff objecting to his being examined, on the ground that the answer disclosed no defense. The referee ruled that the answer set up no defense, and that there was no issue to try, and that the plaintiff was entitled to judgment; to which the defendant excepted. The referee, then, on request of the defendant, permitted him to amend his answer by adding a denial of each allegation of the complaint, except the making of the check, and the trial proceeded.

The defendant admitted the receipt of notice; that the check had been presented for payment, and payment refused; and the notarial certificate of presentment, demand of payment, and refusal for want of funds, was put in evidence.

The plaintiff was then examined as a witness in his own behalf, and gave a detailed account of the facts and circumstances under which the check was made, and rested.

The defendant then moved for a nonsuit, on the grounds, first, that no consideration for the check had been proved; second, that the plaintiff was not the proper party to sue; third, a failure to prove the cause of action alleged in the complaint. The referee denied the motion, and there was an exception.

The defendant was then sworn on his own behalf.

The referee found, as facts, that, on the 20th January, 1859, Benjamin Lumley, at London, in England, appointed the plaintiff his agent to receive all moneys accruing from representations and concerts of Piccolomini in the United States, under a contract between said Lumley and Bernard Ulman; to examine, vouch and settle all accounts on behalf of said Lumley, and to pay to said Ulman such sums as might be coming to him from such representations and concerts. That on and after February, 1859, the defendant was agent or manager for said Ulman, in relation to such representations and concerts in the United States; that in February, 1859, the plaintiff, in New York, as such agent of said Lumley, demanded of defendant, as agent or manager of said Ulman, who was then absent from New York, a settlement of the account of all such representations and concerts as had then been given, which settlement the defendant promised should take place; that in February and March, 1859, several such representations and concerts were given in New York and elsewhere in the United States, and the plaintiff, as such agent as aforesaid, received several sums of money on account of the portion of the proceeds of such representations and concerts, to which said Lumley was entitled; that on the 11th March, 1859, the plaintiff, in the city of New Orleans, demanded of said Ulman a settlement as to all such representations and concerts as had been given, and Ulman then promised plaintiff such settlement, and to give him the check of defendant for the amount or balance which the plaintiff, as such agent of Lumley, was entitled to receive;

and, on the 12th March, 1859, said Ulman promised the plaintiff, in case he did not furnish him such check of the defendant for said balance by twelve o'clock at noon, of the 14th of said March, to assign to him all the receipts of such representations and concerts which should be subsequently given, after deducting the amount to be paid to the manager of the theater, until plaintiff had received such balance; and on the 14th day of said March, said Ulman, by writing, addressed to the manager of the theater, assigned to plaintiff all the moneys accruing to him (Ulman) for such remaining performances in New Orleans, after deducting the sum to which the manager of the theater was entitled; that on the 16th March, 1859, the defendant, at New Orleans, made and delivered to the plaintiff the check or draft set forth in the complaint, and on which this action is brought, which check or draft was so given by defendant, and received by plaintiff, for the balance, amounting to $2,555.75, of the share to which said Lumley was entitled of the proceeds of such representations and concerts, prior to said 11th March, 1859, and the share, amounting to $444.50, to which Lumley was entitled of the proceeds of said performance in New Orleans, on the said 11th March, 1859; and the plaintiff then gave to the defendant a receipt for said check or draft, and specifying the said amounts for which the same was so given and received.

That the plaintiff, in his account with said Lumley, credited him (Lumley) with the amount of said check or draft. That the plaintiff, on said 16th day of March, 1859, sent forward said check or draft, from New Orleans, for collection, and the same was, on the 24th day of said March, duly presented in New York to the drawees, and payment thereof demanded, which was refused, and notice of such presentment and demand and refusal of payment was duly given to the defendant. That after the making and delivery of said check or draft, three such representations were given in New Orleans, as aforesaid, on the 16th, 18th and 19th days of March, 1859 (one on each day), of which the plaintiff under said assignment by Ulman received the whole proceeds to

which Ulman was entitled, and having received said check or draft for the said accounts or sums above mentioned, plaintiff paid to the agent of Ulman the share of said proceeds to which Ulman was entitled. That the interest on the sum of $3,000.25, from said 24th day of March, 1859, to 21st July, 1859, the date of this report, is $68.24, and the whole amount of principal and interest due this day, on said check or draft, is $3,068.49.

The referee's conclusions of law were as follows:

1. That the plaintiff received and holds the said check or draft for good and sufficient consideration, and the defendant is liable to pay the same.

2. That the plaintiff is entitled to maintain the action in his own name for the amount of said check or draft, and without joining said Lumley with him as plaintiff in this action, or otherwise.

3. That the plaintiff is entitled to judgment for said sum of $3,068.49 (the amount of said check or draft, with interest to this date) and the costs of this action.

To these conclusions of law, and to each of them, the defendant excepted.

Judgment being entered on the report of the referee, the defendant appealed to the General Term, where the judgment was affirmed. The defendant now appeals to this court.

Thomas H. Rodman, for the plaintiff.

J. Townshend, for the defendant.

WRIGHT, J. It is insisted that the judgment is erroneous, and for the reasons, *first*, that the check was without consideration; and, *second*, that the action was improperly brought in the name of the plaintiff. Neither of these objections I regard as tenable.

1. The check imported a consideration, and the *onus* was on the defendant to show that, in fact, there was none. This was not necessarily shown by an admission in the pleading, or by proving that it was given in settlement of a balance of account due from Ulman to Lumley for Lumley's share of

the proceeds of the Piccolomini operatic representations and concerts. If the money or funds for which the check was given were in the defendant's hands at the time of giving it to the plaintiff, there was no want of consideration for the promise on the face of the check. It was not shown that he did not hold the funds for which the check was given, and it is inferable from the facts found that he did. The facts were these: Lumley arranged with Ulman that Piccolomini should give representations and concerts in the United States for their joint benefit. The plaintiff was sent from England as the agent of Lumley to receive all moneys accruing from such representations and concerts, to examine, vouch and settle all accounts on behalf of Lumley, and to pay to Ulman such sums as might be coming to him under the contract between Lumley and Ulman. The defendant was Ulman's general agent and manager in respect to such representations and concerts, and acted as such up to the time of giving the check in suit. He appears to have, in person, received and paid all money on account of the performances that took place. In February, 1859, in the city of New York, the plaintiff demanded of the defendant, as Ulman's manager (Ulman being absent from the city), a settlement of the account of all such representations and concerts as had then been given, which settlement the defendant promised should take place. No settlement, however, was at that time had. The performances went on in February and March, in New York and elsewhere in the United States, under the management of the defendant, the plaintiff receiving from time to time from the defendant several sums of money on account of the proceeds of such performances, to which Lumley was entitled. One of these performances was to take place in New Orleans on the 11th March, 1859, both the defendant and Ulman himself being in the city at the time. On that day the plaintiff demanding of Ulman a settlement as to all such concerts as had been given, he promised such settlement, and to give him the check of the defendant for the amount or balance which Lumley was entitled to receive; and the day following promised that if he did not furnish such check by noon of

the 14th March to assign to the plaintiff all the receipts of such representations and concerts which should be subsequently given, after deducting the amount to be paid to the manager of the theater, until the plaintiff had received such balance. On the 14th March, Ulman, by writing, addressed to the manager of the theater, assigned to the plaintiff all the money accruing to him (Ulman) for such remaining performances in New Orleans. On the 16th March the defendant made and delivered to the plaintiff the check in suit for the balance, amounting to $2,555.75, of the share to which Lumley was entitled of the proceeds of such representations and concerts prior to the 11th March, 1859, and the share, amounting to $444.50, to which he was entitled of the proceeds of the performance on the last mentioned day. On receiving the check a receipt for the specific items composing the amount of it was given to the defendant personally.

The transaction, then, in substance, was this: The proceeds of the performances in which Lumley and Ulman were entitled to share, were collected and held by the defendant. The net receipts of the concerts had come into his hands. The fact of Ulman promising, and the defendant giving, his own check and taking a receipt in his own name for the amount due, shows conclusively that the very money for which the check was given was in the defendant's hands. If it was, there was no want of consideration for the promise on the face of the check. Instead of paying over Lumley's portion of the proceeds of the concerts held by him, the defendant substitutes his check therefor, and induces the plaintiff to accept it. Holding Ulman's or Lumley's funds in his hands, and inducing the plaintiff to take his order instead of the funds themselves, the objection that there was no consideration for such order is without force. Nor can the defendant, after thus inducing the plaintiff to accept his check, question the authority of the latter to receive it. No one but the plaintiff's principal could repudiate that authority.

2. The plaintiff was the proper party to bring the action. The promise was made to him. It was a contract in writing

with him personally. Before the Code, an action on the check would have been maintainable only in the name of the plaintiff. Since the Code every action must be prosecuted in the name of the real party in interest, "except that a trustee of an express trust may sue without joining with him the person for whose benefit the action is prosecuted" (Code, §§ 111, 113); and it is declared that the "trustee of an express trust, within the meaning of the section, shall be construed to include a person with whom, or in whose name, a contract is made for the benefit of another." (§ 113.) So that whether the contract was made for the benefit of the plaintiff individually or for the benefit of Lumley, the plaintiff was equally entitled to sue.

The judgment of the Supreme Court should be affirmed.

INGRAHAM, J. The defendant was the agent of D. Ulman. As such agent he received the proceeds of operatic performances. The plaintiff claimed a balance due, and Ulman promised to deliver defendant's check in payment or assign the receipts of certain concerts. He requested defendant to give the check, and plaintiff gave a receipt for the same on Ulman's account and credited Ulman with the amount. Afterward the concerts were held, and plaintiff paid to defendant the share of Ulman which he had received of the concerts, and claims that the said check was held upon a good consideration.

The defendant objects to the recovery upon the ground that the check was given without consideration, and that that fact may be inquired into between the parties. Admitting the law to be as contended for on the part of the defendant, still there is another rule which takes this case out of the class of cases relied on by the defendant. This check was given by the defendant in payment of the claim of Lumley due from Ulman and at his request. It would be the same as a note borrowed by Ulman from the defendant for the purpose of paying Lumley's claim. In such a case it becomes accommodation paper in the hands of the party for whom it was made and to whom it was passed, and if Lumley had a good claim

against Ulman he can collect the amount of this check passed to him by the defendant for the express purpose of paying this debt. This was so held in *Seneca County Bank* v. *Neap* (3 Comst., 442), in a case where the accommodation party put his name to the note without any restriction, and the court held it was rightly used when paid by the holder for a precedent debt, and that the consideration was sufficient. The present case is a stronger one, for the check was paid by the defendant himself in discharge of the debt due from Ulman to Lumley. An objection is made that the action should be in the name of Lumley. The evidence shows, and the referee finds, that the plaintiff credited Lumley with the amount, and afterward, having received the check, the plaintiff paid over to Ulman's agent the proceeds of certain concerts in his hands and which were held by him as security. These facts gave Fish such an interest in the check as would enable him to maintain an action upon it in his own name, independent of the fact that the contract was with him and the check made payable to his order.

The judgment should be affirmed.

All concur,

Affirmed.

JOHN MALTBY v. ANN R. GREENE.

No appeal lies from a judgment by default.

In matter of mechanics' lien in the county of Erie, the court acquires jurisdiction of the subject-matter by the personal service of the notice required by statute upon the opposite party within the time required by law.

THE judgment in this case was rendered in the county court of Erie county, on 30th April, 1859, under the provisions of the mechanics' lien law. The specifications and papers required by the statute were filed in the clerk's office, on 24th December, 1858. On 23d of February, 1859, a notice requiring the defendant to appear in the county court, on the fourth Monday of March, and submit to an accounting, was served on defendant, dated 22d February, 1859. The affidavit of service of notice states the service to have been made 28th March, 1859. The defendant did not appear on the day fixed in the notice, and judgment by default was entered, and the damages were assessed on a writ of inquiry, and final judgment entered against the defendant. From this judgment the defendant appealed to the General Term of the eighth district, where the appeal was dismissed. From that order of dismissal, the defendant appealed to this court.

R. Saunders, for the appellant.

Charles Daniels, for the respondent.

INGRAHAM, J. That an order dismissing an appeal to the General Term of the Supreme Court is appealable to this court, was settled in *Bates* v. *Voorhees* (20 N. Y., 525). In becomes, therefore, necessary to inquire whether an appeal will lie from the judgment entered in the county court, by default of the defendant for not appearing there.

This question was referred to by SELDEN, J., in *Briggs et al.* v. *Bergen* (23 N. Y., 162), in which he says in regard to striking out a sham pleading: "The suit is left in the same condition as if no answer had been put in. In such

cases no appeal will lie from the judgment, it having been obtained through the default of the defendant."

This question was fully examined by PARKER, J., in *Dow* v. *Birge & Wells* (5 How. Pr., 323), citing various cases previous to the Code to show that, under the old system of practice, a writ of error would not lie from a judgment obtained by default. The intent of the Code was the same as had been the previous practice. It allowed an appeal from a judgment of the court, but by that was intended a decision of the court made upon points submitted to them, or questions raised before that court.

In *Jones* v. *Kip* (7 N. Y. Legal Observer, p. 91), it was held, in New York Common Pleas, that no appeal would lie to the General Term of that court from a judgment by default.

In *Perkins* v. *Farnham* (10 Howard, 120), it was decided that an appeal would not lie from a judgment entered on a stipulation, with a view to enable the party to appeal.

In *Hunt* v. *Bloomer* (3 Kern., 343), an appeal was dismissed, upon the ground that the record did not show any exceptions taken at the trial, and in *Otis* v. *Spencer* (16 N. Y., 610), the judgment was affirmed, because no case had been made in the court below. From these cases, I conclude that no different rule exists under the Code than that which was established under the old system of practice. And this court has held, in *Thurbet* v. *Townsend* (22 N. Y., 517), that the power of review conferred by the Code must be the same as that formerly obtained by writ of error, and that there was no reason why it should be other or greater.

I think, therefore, from the authorities above cited, that in no case of judgment by default can there be an appeal to an appellate tribunal; but that the aggrieved party must seek relief, if he be entitled to any, by motion to the court in which the action is pending. If there was any error in the service of process, the court where the action was pending could have corrected the error on motion. If the pleadings were defective, the party aggrieved had a remedy by demurrer, and on that he might have appealed to the appellate court.

The reason for these rules is given by PLATT, J., in *Adams v. Oaks* (20 Johns., 282). When the law allows a defendant the privilege of being summoned, it imposes on him a corresponding duty, which is, if he has any ground of defense he shall appear and prove it in the primary court having cognizance of the matter. To allow him to pass by the inferior tribunal unnoticed, would be to convert the appellate court into one of an original jurisdiction. A judgment by default is, for this purpose, equivalent to a judgment by confession. This doctrine is well settled in the higher courts, and I perceive no reason why it should not be applied to all judicial proceedings where an appeal is allowed.

The conclusion arrived at in this branch of the case disposes of this appeal without the necessity of examining the alleged defects upon which the appeal was taken. They were all matters which should have been brought to the notice of the court below. Many of them, if they were erroneous, would have been corrected on the trial, and would not have been any grounds for sustaining an appeal. It can hardly be considered a safe or proper system to allow a party to rely on a defective pleading in the court of original jurisdiction, and seek to take the benefit of such defect on appeal where the court could not correct the error. On the contrary, I concur in the opinion above cited that in such cases the default in not appearing is to be considered a confession of judgment, from which the defendant cannot appeal. The order should be affirmed.

WRIGHT, J. This is an appeal from an order of the Supreme Court dismissing an appeal from a judgment of the Erie county court, rendered by default in a proceeding under the mechanics' lien law (Laws of 1844, chap. 305). All that the Supreme Court had before it was the record of the judgment of the county court for the amount of the claim of the party furnishing materials.

The Supreme Court dismissed the appeal on two grounds: first, that it would not lie to review a judgment rendered by the county court by default; and, second, that if this were

otherwise, there was no error or irregularity in obtaining the judgment, or, at least, none of a jurisdictional nature. The order, I think, is right on either ground, but it is, perhaps, only necessary to allude to the latter one.

The act of May 7, 1844, declares that any person performing labor or furnishing materials for building, altering or repairing any house or other building, in the several cities of the State (except the city of New York), by virtue of any contract with the owner thereof, shall have a lien for the value of such labor and materials, upon such house or building, and upon the land upon which the same stands (§ 1); and it prescribes the mode of creating such lien, its duration, and how it may be discharged. (§§ 2, 3.) The person performing the labor, or furnishing the materials, is to cause specifications to be drawn up, and file the same in the office of the clerk of the county in which the building or premises are situated, and serve notice thereof personally on the owner or his agent. The filing of the specifications, and serving notice thereof, in respect to any labor performed, or to be performed, or materials furnished, or to be furnished, in building, altering or repairing any house, or other building, in the city of Buffalo, may be made at any time prior to thirty days after the labor shall be performed, or after the house or building or the alterations or repairs of which shall be completed; and the filing of the specifications and service of the notice creates a lien in favor of the person performing such labor, or furnishing such materials, for the amount of the labor performed and materials furnished, whether performed or furnished before or after such filing and service. (Laws of 1851, chap. 517.) The clerk of the county is directed to keep a book, to be called "The mechanics' and laborers' lien docket," in which shall be entered the name of the owner, and opposite thereto the name of the person claiming the lien, the lot or street on which such work is to be done, or materials furnished, and the time of filing such specifications. The lien created takes effect from the time of filing and service of notice, and continues for one year thereafter, but may be discharged on the docket at any time

by the clerk, on the production to and filing with him a certificate, signed by the person having the lien, and duly acknowledged and proved, that the claim for which such lien was created is satisfied and discharged. (§ 3.)

The next four sections of the act prescribe the manner of enforcing or bringing such lien to a close. It is by a proceeding in a county court, or justice's court, distinct and independent of that creating the lien between the claimant and the owner, to settle the amount due, and obtain a judgment therefor. As was said in *Freeman* v. *Crane* (3 Comst., 305): "The court is not required to adjudicate upon the validity of the lien, or the time of its commencement. The judgment is to be rendered and enforced, in all respects, like a judgment in an action of assumpsit. * * The judgment record is not evidence of the existence of the mechanics' lien, of the time of its commencement, or of the quality or description of the real estate which it affects. It could not be made so against third persons not parties to the suit. In case of the enforcement of the lien by an execution, and sale within the year, if a dispute should arise between the purchaser and some third person, with respect to the priority of their respective rights, the purchaser would be required to prove the existence of the mechanics' lien by evidence not contained in the judgment record." The most that can be claimed is, that there is a statutory implication that the summary proceeding for obtaining judgment for the amount due, must be instituted before the lien ceases.

The court acquires jurisdiction of the subject-matter, and of the parties, by either the owner of the building, or the laborer or material man, serving personally on the opposite party, a notice, requiring him to appear in the county court or justice's court of the county in which the building is situated, at a time specified in such notice, not less than twenty days from the service thereof, and submit to an accounting and settlement in such court of the amount due or claimed to be due, or for the labor performed or the materials furnished. In this case the claimant served the required notice on the owner to appear in the Erie county court, on the

fourth Monday of March, 1859; and at the time, served on her a bill of particulars of his claim, accompanying the same with a notice to produce a bill of particulars of any offset within ten days thereafter. The owner did not appear at the time and place specified, or furnish any bill of particulars of any offset, and on the 22d April, 1859, her default was entered, and a writ of inquiry ordered to issue. The writ was executed and inquisition returned, assessing the claimant's damages at $83.84, and an order for judgment final entered thereon on the 26th April; and on 30th April, judgment for that amount, with costs, was signed and filed. The proceeding in the county court was strictly in accordance with the statute, which provides that in case the owner shall not appear and submit to an accounting and settlement at the time and place specified in the notice, his default shall be entered; a writ of inquiry and inquisition may issue to the sheriff of the county, to be executed; "and judgment shall be entered upon the same, and execution shall issue for the enforcement of the claim so adjudicated and established, in the same manner as in cases upon judgments in such courts, in actions of assumpsit." (§§ 4, 5, 6.)

It is not or cannot be claimed by the appellant, that the Supreme Court erroneously dismissed her appeal, unless from the face of the record of the county court, it appears that that court had no jurisdiction of the subject-matter, or entered a judgment unauthorized by the statute. Neither of these things appeared. The notice to appear and account, etc., gave jurisdiction, and the proper judgment was rendered and entered. The point is made that it does not appear by the record that the incipient proceedings to create a lien were ever taken. It is not required that it should; and following the statute directions as to the accounting, and rendition and entry of judgment, the fact would not necessarily appear by the record. But it does, in fact, appear both by the recitals in the writ of inquiry, and in the judgment. Again, it is said that by the record it appears that the notice requiring the defendant to appear and submit to an accounting and settlement, was not served twenty days before the time speci-

fied for the appearance in the county court. It does appear by the copy affidavit of the service of the notice filed when the defendant's default was entered (as it is printed in the case), that the service was less than twenty days before the time designated for the appearance, accounting and settlement; but the order for the defendant's default, in reciting the proofs on which it was granted, states that the notice was served more than twenty days prior to the time specified for appearing, and to the same effect is the recitals in the writ of inquiry and in the judgment. Undoubtedly, the statement of the date of service is erroneously set forth in this affidavit. The notices are dated the 22d February, 1859, and the time designated for appearance was the fourth Monday of March following. The affidavit states the service to have been on the 28th March, the very day for appearing. It is most probable that the month of service was February instead of March; and, either that in the affidavit, March was, by mistake, inserted for February, or that the affidavit is given incorrectly in the case. At all events, looking at the whole record, it does not appear, as the appellant's counsel insists, that the notice and the bill of particulars were served on the defendant the very day she was required to appear in court. Again, it is claimed that the proceeding and judgment warranted by the statute, are *in rem* against property, and not against the person; and that the entry of a personal judgment was unauthorized. There is nothing in this point. The statute provides, that in case of a default, a writ of inquiry may issue for the assessment of the damages, "and judgment shall be entered upon the same, and execution shall issue for the enforcement of the said claim so adjudicated and established, in the same manner as in cases upon judgments in courts of common pleas and justices' courts, in actions of assumpsit;" and where the parties appear, the cause "shall be governed, tried, and the judgment therein enforced, in all respects, in the same manner as upon issues joined and judgments rendered in actions of assumpsit in the said court." (§§ 6, 7.) Judgments in actions of assumpsit are, in form, personal, and the manner of

enforcing them is by execution. When the judgment is to be enforced in the same manner, it can hardly be claimed that it should be different in form from the ordinary judgment in assumpsit. The mode of enforcing it indicates what its form should be. In *Freeman* v. *Cram* (3 Comst., 305), it seems to have been the construction of the statute by this court, that the judgment is to be rendered in form against the defendant, who is personally liable for the debt, and is a lien upon all the defendant's real estate, continuing for ten years against purchasers, and longer against the defendant himself.

The record of the county court, therefore, discloses no error, jurisdictional or otherwise. But after jurisdiction was acquired, had there been irregularities, the place to correct them was in the county court, and not on appeal. If the appellant had any cause of complaint, she should have moved in that court, where the proceedings, if not strictly regular, could have been corrected, and where amendments would have been permitted if necessary, for the purpose of correcting any mistakes in the papers.

The Supreme Court examined the record, and, finding no error or irregularity in the proceedings going to an entire want of judgment in the county court, dismissed the appeal. Perhaps the better course would have been to have affirmed the judgment. But the defendant's right of appeal to this court was equally secured by either practice.

The order should be affirmed.

All concur in affirmance on the several grounds stated by WRIGHT and INGRAHAM, JJ., except MULLIN, J.

Affirmed.

CHARLES GODFREY v. JOHN R. JOHNSTON et al.

When there is any evidence of a conflicting character touching material issues the question is one for the jury, and their finding is conclusive as respects this court.

If there are errors in the findings of the jury, the correction must be made at General Term—if the Special Term sustains the verdict—otherwise the party is without remedy.

THIS action was brought by the plaintiff to recover, for damages alleged to have been sustained by him by the breach, on the part of the defendants, of a contract safely to carry certain goods from Geneva, in this State, into the State of Virginia, by reason whereof the said goods became wet and injured.

The answer denied the allegations of the complaint, and set up, as a defense, that the boat on which the said goods were shipped was chartered by the plaintiff, and that he, and not they, were the carriers of the goods.

On the trial, the plaintiff gave in evidence an agreement, in writing, between the defendants, in and by which they agreed to organize a company, with a capital stock of $28,000, which was allotted amongst the defendants, for the purpose of building a steamboat to navigate the Seneca lake, for the profit and advantage of said stock or shareholders.

John R. Johnston, one of the defendants, was called and examined as a witness, and testified that he was the agent of the defendants in running said boat in 1852, and had been from the organization of the company in 1836; that, as such agent, he was applied to by the plaintiff to carry certain furniture, or other goods of the plaintiff, from Geneva to Virginia; that he declined to complete a bargain until the matter had been submitted to the stockholders, at a meeting then soon to be held; that, at such meeting, he submitted the proposition, and it was assented to by them, or, if not expressly assented to by all, no one dissented, and thereafter he agreed, in consideration of $300, to carry the plaintiff's goods to Virginia. The company, at the time, owned a pro-

peller called the "Reynolds," which was not needed by them, and one motive for entering into the contract was to send the said vessel to Virginia, and there sell, as it was expected, for a better price than could be obtained in Geneva. The propeller had been lying for some time without being laded, and her upper seams had become open, and she leaked a good deal. After the bargain was made, the goods were shipped on board the vessel. It was soon discovered that she leaked, but she was, nevertheless, sent on her voyage, and when she arrived in New York, it was found unsafe to send her forward, and a schooner was then chartered by defendants' agent to carry forward the goods, and they were carried accordingly, and delivered to plaintiff in Virginia.

The plaintiff was himself sworn, and testified to substantially the same state of facts.

The plaintiff also gave evidence showing that the goods were injured to the extent of $1,350, and rested.

The defendants moved for a nonsuit, on the ground that the defendants were not liable on the contract made by Johnston with the plaintiff; that he could not bind them, by contracts, for the carriage of goods beyond Geneva lake; and that there was no proof that the defendants ever assented to the making of any such contract. The court refused to nonsuit, and the defendants' counsel excepted.

Two of the defendants were called, on their own behalf, and testified that they were present at the meeting at which Johnston claimed the defendants assented to his making a contract with the plaintiff for the transportation of these goods, and that no such proposition was made or assented to at such meeting; that the only proposition submitted to that meeting by Johnston was to charter the propeller "Reynolds" to the plaintiff, and that was not only not assented to by all, but that both witnesses thereon refused to assent to it.

Other evidence was given tending to prove that the plaintiff had chartered the boat, and was running it on his own account. He received passage and freight money, and hired one or more of the hands employed upon her.

At the close of the evidence the defendants' counsel renewed the motion for a nonsuit, but it was overruled, and he excepted.

The court charged the jury that the defendants were not liable unless they found that the contract made with the plaintiff by Johnston was authorized by them; that, if the defendants assented, they would be justified in finding for the plaintiff; that, if they believed Johnston, the defendants did assent; but, if any dissented, the majority could not bind those dissenting.

The jury rendered a verdict for the plaintiff for $1,350.

After the trial the defendants' counsel made a motion for a new trial, on a case made, and upon affidavits; that the defendants were surprised by the evidence of Johnston that the other defendants had ever assented to the contracts for the carriage of the plaintiff's goods. The motion was denied, and that order was affirmed at the General Term in the seventh district. The same court also affirmed the judgment; and from that judgment the defendants appeal to this court.

James Noxon, for the appellants.

S. G. Hadley, for the respondent.

MULLIN, J. The motion for a nonsuit was properly denied. The plaintiff, before resting, had proved, by Johnston and his own oath, that a contract for the carriage of his goods had been made with defendants, with their knowledge and assent. This evidence most clearly authorized a verdict for the paintiff. Concede that the evidence of Johnston was not as clear and conclusive as it might be on the question of assent, yet it was some evidence on that point. It was, therefore, the duty of the court to submit it to the jury. There was no question made, on the trial, as to the admission or rejection of evidence, nor as to the charge of the court. We are called upon to reverse the judgment, because the jury has come, in the opinion of counsel, to an erroneous conclusion on the questions of fact. It cannot require the citation of authorities to show that we possess no such

powers. Errors of this kind must be corrected in the General Term; and if that court refuses relief, the injured party is remediless. When the General Term reverses a judgment for error of fact, this court will look into the evidence, to see whether there is any evidence to support the findings of the General Term. If there is not, the judgment will be reversed: if there is, it will be affirmed. (*Davis* v. *Wycoff*, 18 N. Y., 45; *Griffin* v. *Marquardt*, 17 id., 28).

This is the only case in which this court can enter into an investigation of the facts appearing on the trial.

It is possible that if we had been sitting in the place of the jury, we might have discredited the plaintiff's evidence, in view of the positive denial of the defendants, and the facts proved by their other witness. But the law has made the jury the tribunals to pass upon the facts, and not us. And as there must be a power, somewhere, finally to dispose of disputed questions of fact, it has been left, wisely or unwisely, with the jury—with a limited power of review in the Special and General Terms. In thus holding, we only re-affirm a rule laid down at the organization of the court, and adhered to ever since.

The application to the General Term for a new trial, on the ground of surprise, was addressed to the discretion of the court, and is not appealable.

The judgment must be affirmed, with costs.

WRIGHT, J. It may be that the weight of evidence was in favor of the defendants, and that injustice was done to them by the verdict in the case; but this court is not the tribunal for the correction of errors of the jury.

The action was for the breach of an agreement by the defendants, to transport, from Geneva to the plaintiff's residence in the State of Virginia, certain household goods and other property of the plaintiff. The defendants were copartners engaged in the transportation of passengers, merchandise and freight, in steam vessels upon Seneca lake, under the name and style of the Seneca Lake Steamboat Company, and of John R. Johnston & Co. Johnston, one of

the partners, resided at Geneva, and acted as agent and manager of the affairs of the company. In the fall of 1852, the plaintiff was about removing to Virginia, and Johnston contracted with him, as the agent of the defendants, to transport his goods. The company owned the propellor "Reynolds," and the goods were placed on board of her at Geneva for transportation; and she proceeded on her journey to New York. She leaked badly before she started, and was so unseaworthy when she reached New York, that Johnston, who was there, doubted the propriety of her going on, and chartered a schooner, and had her freight taken out and put on board the schooner. The plaintiff's property, when transhipped, was in a very wet and damaged condition, and some of it entirely destroyed, and in that state it was delivered to him in Virginia. The amount of damages by loss and water was $1,350. The contract made by Johnston with the plaintiff was not within the scope of the partnership business, and hence it was necessary to show that it was entered into with the assent of the other defendants. Whether it was authorized by the defendants, was a question of fact, in respect to which the evidence was conflicting. Johnston's testimony tended to show that before closing the contract, he submitted it to his associates, at a meeting held by them, and they assented to it; whilst the testimony of two of the defendants, Dox and Watson, who were at the meeting, tended to show that there was no assent, but, on the contrary, one or more of the associates expressely dissented. I think the weight of evidence was against the position that there was an assent on the part of the defendants; but there was certainly some evidence tending to show such assent, and the judge would not have been justified in withholding this disputed question of fact from the jury.

There was but a single exception in the case, viz.: to refusing a nonsuit. The judge properly refused it; and the judgment of the Supreme Court should be affirmed.

All concur.

Judgment affirmed.

GILBERT P. SHERWOOD, etc., EXECUTOR, v. THE AMERICAN BIBLE SOCIETY and others.

The right to take and grant property is of the essence of every corporation, whether created by license, by prescription, or by legislative act, and in the absence of legislative prohibition may take by all the usual modes of acquiring property. PER WRIGHT, J.

There is no statute in this State prohibiting corporations from acquiring personal property by bequest.

By comity we recognize the existence of corporations in other States, and permit them to exercise the powers with which they are endowed in our own, unless repugnant to our policy or injurious to our interests.

To constitute a charity in a legal sense the use must be public. PER WRIGHT, J.

There must also be a trustee competent to take the fund so as to secure the appropriation to the purpose intended. There can be no valid trust unless the title can vest in some person natural or artificial by favor of the gift itself.

APPEAL from judgment of Supreme Court. Action for construction of will. On the 25th December, 1858, Ann P. Sherwood, who owned personal estate of the value of $18,000, and real estate of the value of $4,500, died, leaving a will executed some nine days before her decease. This instrument contained the following bequests:

"*Second.* I give and bequeath unto the American Bible Society the sum of two thousand dollars.

"*Third.* I give to the American Tract Society two thousand dollars.

"*Fourth.* I give and bequeath unto the Arcot Mission of the Reformed Dutch Church the sum of three thousand dollars, to be used for the education of the heathen boy on whose account I have heretofore advanced money.

"*Fifth.* I give and bequeath unto the American Colonization Society one thousand dollars."

The residue of the testatrix's estate was given and devised to her two children, Gilbert P. Sherwood and May P. Sherwood, share and share alike; and her son Gilbert was appointed sole executor of the will.

In November, 1860, the executor brought an action to obtain a judicial construction of the instrument, alleging

that doubts had arisen whether the bequests to the American Bible Society, to the American Tract Society, the Arcot Mission of the Reformed Dutch Church, and to the American Colonization Society were valid and legal bequests; and whether said societies are incorporated, or if incorporated, whether they can, by their acts of incorporation, severally take the bequests mentioned in the will. The several societies and May P. Sherwood were made defendants.

The action was tried at the New York Special Term, in December, 1861, before Mr. Justice GROVER, who, in addition to the facts above stated, found that the American Bible Society in the will named, was duly incorporated under and by virtue of an act of the legislature of the State, passed on the 25th March, 1841, for the purpose of publishing and promoting a general circulation of the holy scriptures without note or comment; that the American Tract Society, in said will mentioned, was, by an act of the legislature of this State, passed on the 26th day of May, 1841, incorporated for the purpose of printing and circulating religious tracts and publications; that the Arcot Mission of the Reformed Dutch Church, in said will mentioned, is not, and never was, incorporated, but is a branch of the Board of Foreign Missions of the Reformed Protestant Dutch Church, in said will mentioned, which Board of Missions, at the time of the date of the will and the death of the testatrix, was not incorporated, but was incorporated by an act of the legislature of the State of New York passed in 1860; and that the American Colonization Society, in said will mentioned, was, by an act of the general assembly of the State of Maryland, passed on the 26th day of December, 1836, incorporated for the purpose of colonizing the free people of color of the United States, and was by said act of incorporation empowered to take lands by devise, and money, goods or chattels by bequest.

His conclusions of law, from the facts thus found, were, and he decided, that the several legacies to the said American Bible Society, American Tract Society, and American Colonization Society are valid; and that the same be paid by the executor from the estate of the testatrix, with costs to each

of the said legatees to be adjusted; also, that the legacy to the said Arcot Mission of the Reformed Dutch Church is invalid, but no costs are allowed to the plaintiff or to the Arcot Mission as against each other.

Judgment being entered in conformity to this decision, the plaintiff and the defendants, May P. Sherwood and the Arcot Mission, appealed to the General Term. The General Term affirmed the judgment, with costs of the appeal to be paid out of the estate of the deceased to the attorneys of all the parties in the action, including the Arcot Mission, whose costs on the appeal were adjusted at the sum of one hundred and thirteen dollars and fifty-four cents. From this judgment of affirmance the plaintiff and the defendants, May P. Sherwood and the Arcot Mission, appeal to this court.

A. W. Bradford, for the plaintiff.

S. H. Thayer, for the American Bible Society.

G. N. Titus, for the American Tract Society and the American Colonization Society.

L. K. Miller, for the Arcot Mission.

WRIGHT, J. It will be convenient to examine in order the validity of the bequests; first, to our own corporation; second, to the foreign corporation; and third, to the voluntary association, styled in the will, the "Arcot Mission of the Reformed Dutch Church."

1. In respect to the bequests to the Bible and Tract Societies: These societies were, in 1841, created by the legislature bodies corporate, and invested with the general and incidental powers and attributes of a corporation aggregate at common law. The purposes for which they were formed were specified; a limitation set upon the amount of income to be derived from property respectively held by them, and it was declared that they should possess the general powers, and be subject to the provisions of the title of the Revised Statutes, "Of the general powers, privileges and liabilities of corporations." (Laws of 1841, chap. 68, 266; 1 R. S., 599.)

The powers enumerated in the general statute referred to, were those which at common law pertained to corporations aggregate, and the statute was but declaratory of the common law in respect to the rights of such corporation. The right to take and grant property, was and is of the essence of every corporation, whether created by license, or prescription, or by legislative act, and in the absence of any statutory prohibition, they may take by all the usual modes of acquiring property. They always had the right at common law to take personal property *by bequest* (Angell & Ames on Corp., p. 111, § 6; *In the matter of Howe*, 1 Paige Ch., 214; *McCasler* v. *Orphan Asylum*, 9 Cow., 437; *Williams* v. *Williams*, 4 Seld., 530; *McDonough, Ex'r*, v. *Murdoch*, 15 How. [U. S.], 367; *Att'y-General* v. *Roper*, 2 P. Wms., 125; Grant on Corp., 116, 117); and I entertain no doubt that they have that right under our statutes. In the statute enumeration of the general powers of all corporations is that of *holding*, purchasing and conveying such real and personal estate as the purposes of the corporation may require, with the power to *hold* and *purchase* property. All other powers necessary to its exercise are given. (1 R. S., 599, §§ 1, 3.) This includes the power of taking by all the usual modes of acquiring property not forbidden to corporations by the statute. The statute of wills prohibits them from taking lands by *devise* unless expressly authorized by their charters, or by statute (2 R. S., 57, § 3), but there is no statute imposing any prohibition in respect to the manner of their acquiring personal property. The same legislature which enacted the statute concerning corporations, enacted the prohibition in the statute of wills; but unless the power to take lands by devise was embraced in the statutory grant of powers to corporations, the enactment of the prohibition was unnecessary. It was, I think, embraced, hence the necessity of the prohibition, and the inference is irresistible that the same grant of power vested in corporations the capacity of taking a pecuniary gift by will. It is urged that the statute has restricted corporations to the acquisition of personal property by *purchase* in the ordinary acceptation of the term; but the interpretation has

been repudiated by this court. In *Downing* v. *Marshall* (23 N. Y., 366), it was held that the two corporations, the capacities of which we are now considering, were free to take money or personal property by testamentary gift, though it was to be raised by a conversion of real estate. The gifts, therefore, to the American Bible Society and the American Tract Society, were not invalid for want of power or capacity, as corporations, to take them, and this is the only ground urged against their validity.

2. As to the bequest to the American Colonization Society: This is a foreign corporation, created for the purpose of colonizing the free people of color of the United States, and was expressly empowered by its charter to take money, goods and chattels by bequest. The objection, therefore, of want of capacity to receive a testamentary gift has no application. But it is said that corporations are artificial beings, created by the sovereign authority, and can have no existence, or exercise any of their powers beyond the jurisdiction of the sovereignty which creates them. It is true that the corporation in question can have no legal existence outside of the State of Maryland, but its existence there may be recognized in this State; and its residence in Maryland creates no insuperable objection to its receiving a gift of money by will from a resident of New York, it being authorized generally by its charter to take such gifts. Of course, the exercise of this power depends for its validity upon our laws, and upon the sanction, express or implied, of the State; and so do the exercise within our jurisdiction of all other powers of corporations of another sovereignty. By comity we recognize the existence of a corporation in another State, and permit it to exercise the powers with which it is endowed in our own, unless such exercise is repugnant to our policy, or injurious to our interests. It is not more contrary to State policy to allow an artificial than a natural person of another State to take a testamentary gift of money from a donor residing here. This would undoubtedly be otherwise if our own corporations were without the faculty of taking such donations; for a prohibition upon the latter would be a plain

indication of State policy on the subject. But as has been seen, our corporations are free to take personal property by bequest. The gift, therefore, to the American Colonization Society was not invalid.

3. The remaining bequest, the validity of which is questioned, is, in the words of the will, to "the Arcot Mission of the Reformed Dutch Church, to be used for the education of the heathen boy on whose account I have heretofore advanced money." The Arcot Mission was a voluntary association of male and female missionaries, located in southern Asia. This body of missionaries had its own officers, a secretary and treasurer, and was, at the death of the testator in 1858, associated with, or under the control of the Board of Foreign Missions of the Reformed Dutch Church, a body which was not incorporated until 1860. The object of the mission was "to preach, and teach both children and adults, and generally to disseminate christianity among the people in the region where it was located." Its functions were exercised at large, and not with reference to specific individuals. It cannot be implied from the expression "to be used for the education of the heathen boy on whose account I have heretofore advanced money," that some particular person was intended by the testatrix. In connection with the proofs, it is obvious that this and previous contributions were general — for our heathen boy — a form not unusual with a continuous charity when no particular recipient is within the view of the donor. Indeed if it was a trust credited for the use of a particular person, a single individual; it would not be a "charity" in a legal sense; for to constitute a charity the use must be public in its nature. (*Ormnany* v. *Butcher*, 1 Turn. & Russ.) But whether the use be a charitable or private one, it is invalid, for the reason that there is no trustee competent to take the fund so as to secure its appropriation to the purpose intended. Where there is no trustee appointed having legal capacity to take and hold a gift, the legal estate can never vest and of course no use can be raised. There can be no valid trust, unless it be so constituted that a title can vest in some person natural or artificial by favor of the gift itself." (*Downing* v.,

Marshall, 23 N. Y. 382.) As was truly said, in *Owens* v. *The Missionary Society* (4 Kern., 406), "to constitute a valid use there must be in all cases, first, a trustee legally competent to take and hold the property; and, secondly, a use for some purpose clearly defined." If there be no such trustee in the first instance, the attemped disposition fails. In fact there is no trust, and a court of chancery acquires no jurisdiction of the case. It cannot be pretended that the "Arcot Mission," a voluntary and fluctuating body of persons unknown to the law and irresponsible to the courts, was legally capable of taking the legacy under the will of the testatrix. Indeed the Board of Foreign Missions of the Reformed Dutch Church, under whose auspices the missionary labor at Arcot was conducted, was at the death of the testatrix itself incapable of receiving the gift; not having been incorporated for more than a year thereafter.

It may be deemed settled in this State that a voluntary, unincorporated association has not legal capacity to receive a donation, even for a purpose denominated "charitable." In *Owens* v. *The Missionary Society* (4 Kern., 380), the question was whether a bequest to such an association, for a "charitable" purpose was valid. It was held that it was not on account of its want of capacity to take the fund and effectuate the charity. So, also, a similar conclusion was reached in *Downing* v. *Marshall* (23 N. Y., 366). There the bequest was to an unincorporated body of persons, known as the Home Missionary Society. The purpose of the trust was religious or charitable. The fund was to be devoted to the same object as in the present case, viz., christian missionary labor. The bequest was held void for want of a competent trustee.

These conclusions upon the disputed matters in the will accord with those of the Supreme Court, and lead to an affirmance of its judgment in the suits.

I am in favor of such affirmance with costs of appeal to the three incorporated societies to be paid by the executor from the assets of the estate; but without costs of the appeal to the Arcot Mission. Indeed, so much of the judgment of

the General Term as gave costs of appeal to the Arcot Mission should be reversed.

All concur,

Judgment affirmed.

WILLIAM TRUSLOW, Respondent, *v.* MERVEN G. PUTNAM, Appellant.

A constable levying upon the interest of defendant in execution, in property legally held by a third party in virtue of an existing lien, cannot remove the property from the possession of such third party; and if he does so he will be liable therefor.

L. B. Pike, for the respondent.

W. A. Beach, for the appellant.

HOGEBOOM, J. This was an action of replevin for seven sewing machines manufactured by one Lester, of whom the plaintiff was agent and factor, and on which he had a lien for his advances and commissions, to an amount beyond the value of the property. Defendant, as constable, levied on same under an attachment against Lester, and was about removing them, when plaintiff replevied them in this action. Defendant offered to prove what West (the agent in charge of the shop where the sewing machines were), said as *to whom he acted for* while in the shop engaged in the business, on being inquired of by the plaintiff in the attachment. The evidence was overruled and an exception taken.

1. I am inclined to think Lester had a leviable interest in the sewing machines, liable to be sold on execution, but as plaintiff was in possession, having a valid lien thereon, and special property therein, they were not liable to be taken out of plaintiff's possession any more than the goods of a partnership from the possession of the firm, on an execution against an individual partner. Hence, that the constable was liable to an action for removing the goods, and for their whole value, if the lien exceeded such value.

2. I am also inclined to think the objection to the attachment (which was overruled at the circuit) cannot be considered. The defendant may have other evidence to explain, or account for the apparent defect in the attachment.

3. I think the evidence objected to was properly excluded. West was in charge of the shop, but not to answer unauthorized questions as to who was his principal. Neither Lester nor Truslow put him there for that purpose.

Nor was the evidence similar in principle to that admitted in behalf of the plaintiff. There the sheriff levied on the property in the shop of which West was in charge, and it was proper to show that West *notified* him at the time, that the property was *Truslow's* and not *Lester's*. It was *a notice* proper to be proven, to show that the constable had information as to the title, and to prevent any pretense of *estoppel* upon Truslow from the silence of his alleged agent when a claim was being made on the property as belonging to Lester.

The judgment should be affirmed.

All affirm except SELDEN, J.

Judgment affirmed.

DANIEL HONEGSBERGER v. THE SECOND AVENUE RAILROAD COMPANY.

If an infant insist on a right of action he must show compliance with the conditions on which his right of action is to arise, irrespective of his age.

APPEAL from a judgment of the Court of Common Pleas of the city of New York affirming a judgment for the plaintiff obtained in that court.

The plaintiff sues to recover damages sustained by him in consequence of injuries inflicted on his infant son by the negligence of one of the defendants' servants. The defendants deny the plaintiff's allegations, and say that the injuries were occasioned by the carelessness of the boy. On the trial the following facts were shown:

Solomon, the plaintiff's son, on the 22d of May, 1857, was attending the public school situated on the east side of the First avenue, a little north of Ninth street. He lived in Ninth street, on the west side of the avenue. At three P. M., just as the scholars were let out from school, and the boys, including plaintiff's son, were chasing each other and tapping each other with their books, one of the defendants' cars was being driven up town by one of their drivers. A person had just before that got on the platform in front, and was standing near the driver, and the driver was conversing with him. The driver's face was turned toward this passenger and his body was turned a little toward him. At this point of time the boy was crossing the avenue on his way home. He was running across the avenue from east to west. According to the plaintiff's evidence, he fell on the track. The horses, at the time he fell, were some distance, half the car's length, from him. The driver did not see the boy until his attention was called to him, and did not see him as soon as the passenger who was on the platform with him. When his attention was called to the boy, he did not manifest sufficient energy or impulse. The car might have been stopped before reaching the boy. It was not stopped until the car had passed completely over the boy and a length and a half

beyond. According to the defendants' evidence, the boy ran against the flank of one of the horses attached to the car, and the driver immediately applied the brake and stopped the car as soon as he could. The car passed over the boy's arm and crushed it. It had to be amputated above the elbow joint. The age of the boy is not in proof, though the counsel for the defendants assumed that he was only six years of age, and it is stated in the complaint, and not denied in the answer, that he was six and a half years old.

There was conflicting evidence.

The jury rendered a verdict for $869.50 damages, being the amount of outlay occasioned to the plaintiff by the accident.

The general question of negligence was left to the jury under a charge from the presiding judge, so far objected to, that "it is necessary for the plaintiff to prove that the injury was produced by the negligence of the defendants — by their exclusive negligence — and that the boy's negligence did not contribute to it." But the judge further charged that "in determining what would be negligence on the part of the boy, it is not to be understood that a child of the age of the boy is to be held to the same degree of caution, foresight and discretion that would be exacted from an adult. If the child has arrived at an age in which its parents, in the exercise of a sound discretion, are justified in permitting him to go to school alone and unattended; and if they are chargeable with no negligence in suffering him to do so, the child, while in the public streets, is to be held only to the exercise of that caution and discretion of which children of his age *are presumed to be capable.*" If he does that, it is all that the law can require. There may be cases in which an adult, in going through or crossing the public street, would be expected to exercise a degree of discretion and judgment in respect to the safety of his person, or to avoid accidents which would not to the same extent be expected from a child, though he had arrived sufficiently at years of discretion to justify his parents in allowing him to go into the public streets, and especially in going to and from school.

To this charge the defendants excepted.

Andrew Boardman, for the plaintiff, respondent.

John K. Porter, for the defendants, appellants.

HOGEBOOM, J. The charge of the judge as construed in the light of the evidence must be considered as applied to a child of some six or seven years of age. That was the age stated in the plaintiff's complaint and not denied in the answer, and assumed in the defendants' request to charge the jury and not then controverted. So understood, and remembering also the fact that the father and not the child is the plaintiff in the action, I am of opinion that the charge was erroneous. Even as applied to the child if he had been plaintiff, I do not see how such a charge could be sustained if we adhere to the case of *Hartfield* v. *Roper* (21 Wend., 615), decided five and twenty years ago and followed in subsequent cases. (See 5 Hill, 282; *Brown* v. *Maxwell*, 6 Hill, 592; *Spencer* v. *Utica R. R. Co.*, 5 Barb., 338; 27 id., 228; *Button* v. *Hudson River R. R. Co.*, 18 N. Y., 251; *Storrs* v. *Oswego & Syracuse R. R. Co.*, id., 425; *Munger* v. *Tonawanda R. R. Co.*, 4 Comst., 359; 1 E. D. Smith, 74.)

In *Hartfield* v. *Roper*, the infant himself, a child of about two years of age, was the plaintiff, and Justice COWEN, speaking of the rule that a negligent party cannot recover damages consequent upon a collision on the highway, says: "The application may be harsh when made to small children; as they are known to have no personal discretion, common humanity is alive to their protection, but they are not therefore exempt from the legal rule when they bring an action for redress, and there is no other way of enforcing it, except by requiring due care at the hands of those to whom the law and the necessity of the case has delegated the exercise of discretion. An infant is not *sui juris*. He belongs to another to whom discretion in the care of his person is exclusively confided. That person is keeper and agent for this purpose, and in respect to third persons, his act must be deemed that of the infant; his neglect the infant's neglect." "It is plain in the nature of things that if an infant insist on a right of action he must show a compliance with the

conditions on which his right is to arise, and this is entirely irrespective of his age."

In *Munger* v. *The Tonawanda Railroad Co.* (4 Comst., 349), Judge HURLBERT, in delivering the opinion of the court, while speaking of the general rule that in actions for negligence the person bringing the action must be free from negligence contributing to the injury, remarks as follows (p. 359): "Lord DENMAN, in *Lynch* v. *Nurdin* (1 Ad. & Ellis, 29), allowed an exception in favor of the plaintiff, seven years old, who received an injury by getting into the defendant's cart, which was carelessly left in the street. The decision has not, however, been followed in this State; but the negligence and imprudence of the parents or guardians in allowing a child of tender years to be exposed to injury in the highway has been held to furnish the same answer to an action by the child as the negligence or other fault of an adult plaintiff would have done in a similar case. (*Hartfield* v. *Roper*, 21 Wend., 615; *Brown* v. *Maxwell*, 6 Hill, 592.)"

In *Willetts* v. *The Buffalo and Rochester Railroad Co.* (14 Barb., 585, 592), the same rule was applied in the case of a lunatic, who, being in company with his father on a railroad train, was temporarily left by the latter, who stepped off the car to procure some refreshment, and during his absence, the lunatic being applied to by the conductor for his fare, refused to pay the same, and thereupon was ejected from the car, and was run over by another train of cars and killed.

If, therefore, the infant had been plaintiff, and had been guilty of negligence, he could not recover under the law as it is administered in this State; and if he could not recover, the father cannot recover. His right of action is no greater than that of the infant would be, for he claims through the infant and upon the theory that the infant is free from blame. There may possibly be some reason for saying that as he adopts the act of the infant and seeks to derive benefit from it, he must be considered as in the place of the infant, and responsible for negligence in the same way as if he had been the party injured. But it is not necessary to decide that question.

The point then to be determined is, what would be the degree of care which would be required of the infant to exempt him from the imputation of negligence. I know of but one rule on the subject as the law is held with us, and I think it applies to all persons without exception, and makes no discrimination on account of age. It is that degree of care which a person of ordinary prudence would exercise in the situation supposed. There is no other safe rule. No other rule would protect the community. An infant of tender years, incapable of exercising requisite discretion, is not to be permitted to occupy the highway for the purpose of entitling himself to an action for an injury except upon the condition of being subjected to the consequences of negligence attached to persons in general. Otherwise the tenderer the age and the less the discretion, the more perfect and frequent the cause of action, because more easily sustained and oftener occurring. Such a rule is not capable of safe practical enforcement.

I think this position is not answered by saying that the charge assumes that the jury should find the plaintiff free from negligence in sending the boy to school unprotected. The defendant asked the court to charge that such act of the father in sending so young a child to school through so crowded a thoroughfare as the streets of New York, without a protector, would be in itself negligence. The court refused so to charge, and the defendants excepted. But assume that such conduct might not be subject to the imputation of negligence, that is that a prudent person might send his boy of six years old to school alone through the streets of New York, it does not follow that this particular act is free from negligence, nor such as would be likely to be practiced even by boys of that age. Nor does it follow that even if for purposes of education such conduct on the part of the father should not be discouraged, that it is not subject to the condition that if the infant in fact becomes guilty of negligence, and in consequence thereof suffers a personal injury, he is not to take advantage of his own wrong and thereby entitle himself to an action for redress. The charge must be read, I think, as

speaking of negligence in a general way, in reference to a general practice of sending children of such an age to school, as not censurable, and not as applied to the actual circumstances of the present case. I think the judgment should be reversed and a new trial granted, with costs to abide the event.

All reverse except SELDEN, MULLIN and INGRAHAM, JJ.

Judgment reversed.

JOHN N. RICHARDS, Executor, etc., of Platt Richards, deceased, Respondent, v. GEORGE O. WARRING, impleaded, etc., Appellant.

The indorser of a non-negotiable note is not entitled to notice of demand of, and of non-payment by, the maker thereof. By indorsement before delivery or before negotiating it, he may be treated as maker.

Where a party writes his name upon the back of a note not negotiable, there being no contract of indorsement, the courts give effect to it by allowing the holder to overwrite the indorser's name with the real contract, either as maker or guarantor.

THE appeal in this case is by the defendant, George O. Warring (who was sued with James E. Warring and James E. Chapman), from a judgment in favor of the plaintiff, rendered in the fourth district against all the defendants.

The action was brought to recover the amount due upon a note in the following words:

"One year after date we promise to pay Platt Richards eight hundred dollars, with interest, value received.

"Amsterdam, April 1, 1857.

"JAMES E. WARRING,
"JAMES B. CHAPMAN."

Signed on the back, "GEORGE O. WARRING."

The defendant, George O. Warring, alone defended; and, after issue, the cause was referred to and heard before Platt Potter as referee; and, on the trial before him, the following facts were found:

That on the 6th of April, 1857, James E. Warring and James B. Chapman made the note in suit, and on the same day, before delivering the same to the payee, James E. Warring took the note to George O. Warring to obtain his signature thereto, and thereupon George O. Warring wrote his name across the back of the same; and that afterward, on the same day, the note so signed was delivered by Warring & Chapman to Platt Richards, the payee, and he thereupon

advanced to Warring & Chapman the amount of the note on the credit thereof.

Platt Richards died on the 20th of January, 1863, and the plaintiff is his sole executor.

George O. Warring had no portion of the proceeds of the note nor any benefit therefrom, and never had any notice of demand of payment of the makers, or other protest of the note.

Upon these facts the referee decided that George O. Warring signed the note with the intent to become liable to pay the same to the payee, and that the plaintiff was entitled to recover against all the defendants as makers the amount due on the note, and ordered judgment accordingly for $954.33 and costs.

This judgment having been affirmed at General Term in the fourth district (reported in 39 Barbour, 42), the defendant George O. Warring now appeals to this court.

John H. Reynolds, for the plaintiff, respondent.

John K. Porter, for the defendant, appellant.

HOGEBOOM, J. The defendant is prosecuted by the payee of a non-negotiable promissory note as a party thereto. What his precise character and liability are, is the question to be determined. The defendant insists that he is simply an *indorser*, and can be held only in that character, and that as no steps were taken to charge him in that capacity, he is not liable. The plaintiff insists that the defendant is liable in some character other than that of strict indorser for the payment of the note, that he cannot be regarded strictly in the light of an indorser of commercial paper, because the note is not negotiable, and therefore neither possesses the character nor is entitled to the privileges of an indorser, nor to require that the ordinary steps should have been taken to charge him as indorser. The defendant's name appears upon the back of the note, and in a perfectly correct though limited sense, he may be said to have *indorsed* the note, that is to have written his name upon the back of it. If the note had

been negotiable it is clearly settled that he could not have been held without a regular demand and protest of the note, and this upon the principle that as the paper admitted of the contract of indorsement, and the name was written in the place and in the manner in which the names of indorsers usually appear, he must be *presumed* to have intended to adopt that character and no other.

But in the present case the defendant is not an indorser in the commercial sense, and the paper does not on its face import the contract of indorsement. We cannot, therefore, *presume* an intention to assume only the restricted liability of an indorser. The defendant must, therefore, be held in some other character, or must be absolutely discharged as not having contracted any effectual legal liability whatever. We cannot presume that he designed to contract no liability whatever, for he has signed the note, and apparently to give the benefit and responsibility of his name to the party to whom the same should be negotiated; and there are cases which have held parties who have signed under such circumstances, so that there is no legal impossibility which prevented the defendant from becoming liable in some form.

The defendant signed the note before it was negotiated; he signed it at the request and for the benefit of the makers, to enable them to raise money on it; he signed it, as the referee has found, "with the intent to become liable to pay the same to the payee." It was negotiated to the payee after he had thus signed it, and the money obtained upon it; in fact, we may presume upon the credit of his name. He ought, therefore, to be held upon it, if it may be done consistently with the rules of law; and I think he may be without violating any legal principle. It is impossible, as before stated, to confer upon him the character of an indorser, or, in the absence of evidence, to infer that he intended to assume that relation. Nor, in my opinion, does the evidence of what took place when he made his signature—if that evidence be admissible—show that he intended to contract in that character. He was first presented by the maker of the note with one similar to the present, except that it was pay-

able on demand, and asked to indorse it, which he declined to do, but said he would indorse it if made payable one year after date. The present note was then drawn, and the signature of the defendant procured. It is fair to infer from this evidence that by the language employed the defendant was not contemplating the contingent liability of an indorser only in the strict sense of that term; for the law, which he is presumed to know, did not admit of such a relation; but rather that he would indorse the paper by writing his name upon the back of it, and contract thereby such relations to the other parties to the paper as such a signature would confer or entail upon him. And the referee has, in effect, found that he intended to assume such a relation. He designed, then, to be a *surety* of the makers to the payee, and may be held in that character. What precise name such a relation entitles him to, it is perhaps not indispensable to determine, as I think a complaint setting out the circumstances under which the note was executed, the manner of the signature, and the intent of the party to become liable thereon, would show a cause of action which would entitle the plaintiff to recover. He is, in effect, a maker of the note, an original party to the instrument, whose name, equally with that of the other makers, was intended to give currency and credit to it in the hands of the payee, and on the faith of whose signature, either as principal or as surety for the other makers, the paper was discounted. The signature on the back of the instrument is not inconsistent with his liability as maker, if he, in fact, intended to assume that character. Perhaps also he may be held as guarantor. A contract of that description does not appear to me irreconcilable with the liability he intended to assume; and if he meant to be liable in that character a contract of that description might be written over his name, and I think a consideration "for value received" therein stated, inasmuch as the facts developed on the trial show a sufficient consideration to bind him.

It is enough, however, in my opinion, to declare that he is liable, on the facts proved, to pay the note, and it is not important whether he be called by one name or another. I

find only a single reported case in our own reports resting on facts precisely similar to those which appear in the present case. That is the case of *Griswold* v. *Slocum* (10 Barb., 402). The result arrived at in that case is the same as that to which I have come. The cases there referred to (*Seabury* v. *Hungerford*, 2 Hill, 84; and *Hall* v. *Newcomb*, 3 Hill, 233; 7 id., 416) adopt a course of reasoning which I think warrants a similar conclusion. The case of *Seymour* v. *Van Slyck* (8 Wend., 404) in effect decided what is declared in the head-note, to wit: that "the indorser of a note not negotiable has no right in an action against him to insist upon a previous demand of the maker and notice of non-payment. The indorsement is equivalent to a guaranty that the note will be paid, and not a conditional undertaking to pay if the maker does not. An absolute guaranty may be written over the indorsement upon which a recovery may be had." The only difference which I discover between that note and the present one is that in that the name of the indorser did appear in the body of the paper as payee thereof, while in this the plaintiff's name is inserted as payee. The cases upon this branch of the law — mostly, however, confined to commercial paper—are numerous, and have undergone searching examination, and have led to some conflict of decision. It is unnecessary to refer to them at large. I think the result of the authorities is very well expressed by the compiler of Abbott's Digest, in a note to page 440 of the first volume, in the following words: "If the note is not negotiable, the payee is authorized to overwrite a contract of guaranty, or an original promise to pay the note, over the name indorsed, and may maintain an action thereon; because, unless the indorsement is held to imply such an authority, it is wholly inoperative and senseless, as there can be no liability as indorser in strictness of a non-negotiable note."

The judgment should be affirmed.

DAVIES, J. The referee who tried this action found as facts that on the 6th of April, 1857, the defendants, James E. Warring and Chapman, comprising the firm of Chapman & Warring, made a promissory note in the words following:

"$820. One year after date, we promise to pay Platt Richards one hundred and twenty dollars, with interest, value received.

"Amsterdam, April 1, 1857."

That on the same day of the making thereof, and before the delivering of the note to the payee, the said James E. Warring took the said note to the said defendant, George O. Warring, to obtain his signature thereto; that thereupon the said George O. Warring wrote across the back of said note his name, "George O. Warring;" that afterward and on the same day, the said note so signed was delivered by the said Warring & Chapman to the said Platt Richards, who thereupon advanced to said firm of Warring & Chapman the amount of the said note, upon the credit thereof.

That afterward, on the 20th of January, 1860, the said Platt Richards died, having made his will, appointing the plaintiff executor thereof, etc. That the defendant, George O. Warring, had no portion of the proceeds of the said note, nor any benefit therefrom, and had no notice of demand of payment of the makers or other notice of protest of said note. That the whole amount of said note and the interest thereon were due and unpaid, and that the plaintiff was the legal owner and holder of said note, and as conclusions of law he found, that the defendant, George O. Warring, signed the said note with the intent to become liable to pay the same to the payee. That the plaintiff is entitled to recover against all the defendants as makers the amount of said note and interest.

Judgment upon the report was entered in favor of the plaintiff for $954.33, with costs, and the same was affirmed at General Term.

The cases of *Hall* v. *Newcomb* (7 Hill, 416), and *Spies* v. *Gilmore* (1 Comst., 321), have finally settled the law in this State, that when the paper is negotiable, the party indorsing it as security, before delivering it to the payee, could be held liable *only* as indorser, and is entitled to notice of protest after demand made of the maker. But this rule is applica-

ble *only* to paper negotiable and not to paper not negotiable. In reference to the latter class there cannot, legally speaking, be a contract of indorsement, and all parties to such paper, if charged at all, can only be charged either as makers or as guarantors. This distinction is fully recognized as well by text writers as by the authorities. (Edwards on Bills, 167, 230.) When a party writes his name on the back of a note not negotiable, as there is no contract of indorsement, the courts endeavor to prevent the utter failure of the contract by giving it effect in some other way, as by allowing the holder to overwrite the indorser's name with the real contract implied by law, or recover against him as a maker or guarantor of the note. (*Seymour* v. *Van Slyck*, 8 Wend., 403, 421, and cases there cited; *Dean* v. *Hall*, 17 Wend., 214; *Josselyn* v. *Ames*, 3 Mass., 274; *Hunt* v. *Adams*, 5 Mass., 358; *Herrick* v. *Carman*, 12 Johns., 159; *Dean* v. *Hall*, 17 Wend., 219; *Seabury* v. *Hungerford*, 2 Hill, 80; *Hall* v. *Newcomb*, 3 Hill, 233; *Griswold* v. *Slocum*, 10 Barb., 402.)

The latter case is quite in point. There the action was against William Slocum, who had written his name on a non-negotiable note payable to the plaintiff. The court, in its opinion, say that the defendant put his name on the note as security at the time the note was made and before its delivery to the plaintiff, and that the law was well settled that under such circumstances the defendant may be held liable as maker or guarantor. Unless he is thus liable, he escapes all liability on his contract. His name is placed on the back of the note, but he is not strictly an indorsor, because a legal indorsement can only be made on a negotiable note.

In *Josselyn* v. *Ames* (*supra*), it was held that an indorsee for a valuable consideration of a note not negotiable, may write over the name of the person whose name is written on the back of the note, a promise to pay the contents of the note to the indorsee, who may maintain an action upon such a promise, against such person. This was virtually making the defendant liable as a maker. This decision has been

frequently recognized as law by the courts of this State, in the cases already cited. In *Seabury* v. *Hungerford* (*supra*), BRONSON, J., said "if the note had not been negotiable, or if for any other reason, the case had been such that the defendant could not, by the exercise of proper diligence, have been charged as an indorser, and here had been an agreement that he would answer in some other form, then the plaintiff might have written over the name such a contract as would carry into effect the intention of the parties. When a contract cannot be enforced in the particular mode contemplated by the parties the court rather than suffer the agreement to fail altogether, will if possible give effect to it in some other way." And in *Hall* v. *Newcomb* (*supra*), Justice COWEN said the right to require presentment and notice, depended entirely on the fact of negotiability. That when the contract was that of indorsements, which was always the case upon a negotiable note, the giving it effect in any other form, would therefore, be going beyond the principle which makes a contract inure, as having a different effect, from what its direct words impart. That such a forced construction should never be made, except to prevent a failure of the contract altogether. *Ut res magis valeat, quam pereat.* This maxim, in *Seabury* v. *Hungerford*, furnished the only ground for changing a simple indorsement into a guaranty, or an absolute promise. Being in a note payable to the holder, not negotiable, and so no possibility of raising the ordinary obligation of indorser, there was then room to infer that a different obligation was intended, whether the indorsement be for the purpose of giving the maker credit on a future advance or not.

In the case now under consideration, no such ambiguity prevails. The referee has found that the defendant, George O. Warring, signed the note with the intent, to become liable to pay the same to the payee. It is to be observed that this finding is characterized by the referee as a finding of a conclusion of law. It is nevertheless a finding of a fact in the action, and is none the less so, although designated as a finding of a conclusion of law. We regard the findings of referees what they in truth and in fact are, disregarding

the name given to them. It is therefore incontrovertible that this defendant signed his name to this note, because it was delivered to the plaintiff's testator; that it was so signed with the intent of giving or obtaining credit from him, and that the money was advanced on the faith of such signature. We have seen that it is not a contract of indorsement, and there would be a singular failure of justice if he did not regard the contract of the defendant, what all parties intended at the time it should be, namely, a promise on the part of the defendant to pay the money advanced on the faith of the note, with his signature thereon. Concede that it was a contract of suretyship, it follows conclusively that it was not a contract of indorsement, upon which, as preliminary to the defendant's liability, there should have been a demand of payment of the makers, and notice of such demand and refusal to the defendant, as was observed by the court in *Griswold* v. *Slocum*, (*supra*). The reason why this is not the law in regard to paper not negotiable, is to prevent an entire failure of justice. *Ut res magis valeat, quam pereat.* Not being liable as indorser, if he cannot be held responsible as maker or guarantor, the party escapes all accountability on his contract. This distinction in this respect, between paper negotiable and not negotiable, has been plainly recognized, and is now well established. All the conflict of authority has been in regard to negotiable paper. There has been no conflict in regard to paper not negotiable.

In the present case it cannot be said, that in holding this defendant accountable upon the contract he has entered into, the court is making for him a different contract than that made by himself. He certainly did not make a contract of indorsement which only requires as a condition precedent to his liability, a demand of the maker for payment, and notice of such demand and refusal, to the defendant, as indorser. He certainly entered into some contract with the plaintiff's testator. What was that contract? It is believed that it has been satisfactorily shown to be a contract of guaranty, or that of an absolute promise to pay as one of the makers of the note, in which aspect we regard it. The

defendant's liability to pay is unquestioned, and therefore the judgment against him was correct, and should be affirmed.

All affirm except DENIO, Ch. J., and JOHNSON, J.

Judgment affirmed.

WILLIAM VAN MARTER v. HIRAM G. HOTCHKISS, impleaded with PHILIP C. WELLS.

The provision of the State Constitution respecting trial by jury is not that it shall be used in all cases, but in all cases in which it had been theretofore used.

The practice of referring issues, the trial of which would require the examination of long accounts, has prevailed by the practice of the courts from time immemorial, and is not in conflict with the provisions of the Constitution.

DENIO, Ch. J. The appeal in this case is by the defendant, from a judgment in favor of the plaintiff, rendered on the report of a single referee. The only point made by the appellant is, that the order of reference was unauthorized and illegal.

The action was for services of the plaintiff, as the attorney and counsel of the defendants in an action prosecuted by them, as plaintiffs, against one Gage, and for various disbursements in that action. The printed case on this appeal contains an order for reference, which, after the entitling of the action, is in these words: "On reading and filing affidavits, *showing due cause therefor*, and on motion of C. L. Lyon, of counsel for plaintiff, and on hearing D. H. Devoe, Esq., defendant's counsel, in opposition thereto, it is hereby ordered that this cause be, and the same hereby is, referred to Hiram K. Jerome, Esq., a counsel of this court, residing at Palmyra, N. Y., as sole referee to hear and determine the same, with ten dollars costs of this motion to the successful party, in the event of the suit. It does not appear that there was any appeal to the General Term from this order. The affidavits used on the motion, and referred to in the order, are not contained in the return; and no objection appears to have been taken on the trial to the case being heard before the referee. Both parties were examined as witnesses in their own behalf, respectively, on the merits, and no exception was taken to the report.

The position taken in the appellant's points are, first, that compulsory references are a violation of the constitutional guaranty of the right of trial by jury; and, second, that this being an action, as it is said, to recover a single item, it is impossible that there could have been a long account.

It is difficult to conceive that these objections are seriously made. The practice of referring issues, the *trial* of which would require the examination of a long account, had prevailed, by the practice of the courts, if not since the establishment of the State government, certainly from time whereof the memory of the profession runneth not to the contrary, when the last Constitution was adopted. The provision of that instrument, as well as of the prior State Constitutions, respecting the trial by jury, was not that it should be used in all cases, but that in all cases in which it had been theretofore used it should remain inviolate forever. (Const. of 1846, § 2.) That language was, without doubt, employed for the purpose of retaining, or allowing the Legislature to retain, the other modes of trial which it had been the practice to resort to in exceptional cases.

If it were conceded that we could, on an appeal from a judgment, examine the evidence upon which an order for reference had been made, which is a point not necessary to be decided, we could not do so in this case, where the affidavits read on the motion for the reference had not been returned. The action being upon contract, it might or might not require the examination of a long account, and we are to presume that the evidence produced on the motion authorized the order which was made. If we look into the complaint and the evidence upon the trial contained in this case, it will be apparent that the issue was one to which a reference was peculiarly applicable.

The appeal was wholly without merits, and the judgment appealed from ought to be affirmed, with damages for the delay.

JOHNSON, J. There is manifestly nothing in either of these cases which this court can review. The actions are all between attorney and client, to recover compensation for services rendered and disbursements made professionally.

There is no exception to the report of the referee, and no question was raised in the course of the trial on which any point is made by the appellant's counsel.

The only ground of error alleged is, that the cause was improperly referred to be tried and determined. It is claimed on behalf of the appellant that the court had no authority to refer, and that the order of reference is wholly void and gave the referee no jurisdiction, and consequently the report and the judgment rendered upon it are wholly void. The appeal has evidently been brought to this court for the purpose merely of having the order of reference reviewed. But it is quite obvious that that order cannot be reviewed in this way here. It is not an order involving the merits and necessarily affecting the judgment within section 329 of the Code, and is not brought up by a general appeal from the judgment. It involves a mere question of practice and nothing more. There is no ground whatever for the assumption that the action was taken out of court by the reference and all jurisdiction over it thereby lost. These are all cases which might have been properly referred, upon the necessary facts being shown. The presumption is that the necessary facts were shown, as nothing appears in the case to the contrary. Nothing appears in either of the cases on the subject of the reference, at the time it was made, except the rule by which it was ordered. The rule recites in each case that the reference was made "on reading and filing affidavit showing cause therefor." The presumption is, therefore, that sufficient cause was shown to authorize the reference. Nothing is presumed here in favor of the party alleging error, but the error must appear upon the record. (*Carman* v. *Pultz*, 21 N. Y., 547.) There is not even an exception to the decision granting the order. So that if the appeal brought up the decision granting the order of reference for the review, it would necessarily be sustained as the case stands. I think the appeals are wholly without merit or excuse, and that judgment should be affirmed, with all the allowance which the law authorizes.

All concur, Judgment affirmed.

THE ROME EXCHANGE BANK v. SARAH EAMES and CHARLES KIRKLAND, surviving trustee, etc.

Where the party claims the benefit of a trust conveyance, treating it as valid in his complaint and nowhere therein seeking to impeach it, he is not entitled to relief on the ground that such conveyance is void.

It is a universal rule in chancery to grant relief, if at all, on some matter put in issue by the pleadings.

A deed of trust made for the payment of debts extends only to debts existing at the time of making the deed.

A debt becoming due subsequently to the making of such deed, under the act of March 22, 1811, making stockholders of certain corporations liable for the debts thereof due and owing after its dissolution, is not within the provision of such deed.

THE action was by the plaintiffs, a banking association, to obtain payment from trust property in the hands of the defendant Kirkland, of a judgment for $3,138 damages and costs recovered in December, 1855, against the defendant Mrs. Sarah Eames (now deceased), as a stockholder to the amount of $3,082 in the Manchester Manufacturing Company, which was dissolved in August, 1854.

The cause was tried before the Hon. DANIEL PRATT, without a jury, at the Oneida Circuit, in June, 1857.

On the trial, the plaintiff claimed that the admissions contained in the pleading in this action made out their case, and rested on such admissions. The defendant then gave evidence as to the nature and extent of the trust property originally, the debts and charges upon it, the management by the trustee, the value and description of what was remaining at the time of the trial, etc.

The evidence being closed the judge found as facts:

1. That each of the several allegations of fact contained in the complaint were true. The facts alleged in the complaint were, that on the 3d of September, 1833, Mrs. Sarah Eames, then being the owner and in possession of a large amount of property, both real and personal, made and executed a deed of assignment thereof to Kirkland and one Walter S. Eames, in trust for certain purposes therein expressed, among which

are to pay all the just debts of her, the said Sarah Eames, of every description, etc., which deed is set out. The trusts in the deed are declared as follows: "1st. To pay all my just debts of every description." The intent and object of this clause being fully to secure the payment of all the "*debts due from me* of whatever nature the same may be." 2d. To pay the expenses of the trust. 3d. To invest the balance, and from the net income thereof, and such further and other sums as may be necessary, to provide for her reasonable support and maintenance during her life. 4th. At her decease to distribute all that remains of the property conveyed, and its proceeds, to her children and heirs named. The complaint then alleges that this deed, when executed, was duly delivered to the trustees, and they entered upon the discharge of their duties, and paid out of the transferred property, the *debts* of Mrs. Eames so far as they were then ascertained; that upward of $4,000 still remains in the hands of Kirkland, the surviving trustee, under and by virtue of said trust, and for the uses and purposes in the deed expressed; that before and at the time the trust deed was executed, Mrs. Eames owned $3,082 of the stock of the Manchester Manufacturing Company, and that it never was transferred by her to said trustees on the books of the company, but continued to stand in her name down to the 8th of August, 1854, at which time the company was dissolved; that at the time of said dissolution the plaintiffs were creditors of the company to the amount of over $3,200; that the plaintiffs as such creditors lately brought an action against Mrs. Eames to recover so much of that debt as equaled the amount of stock held by her in said company, and, in December, 1855, recovered judgment against her for $3,138.58; and that an execution has been issued and returned unsatisfied on that judgment; that the plaintiffs have requested the trustee to pay the judgment and he refused so to do; and that the defendant Mrs. Eames is owing no other debts, and under no pecuniary obligations save said judgment.

2. The judge further found, that the Manchester Manufacturing Company was organized as a corporation, under

and pursuant to the provisions of the act passed March 22, 1811, entitled "An act relative to corporations for manufacturing purposes," and continued subject to the provisions of said act as regarded the personal liability of its stockholders to the time of its dissolution; that all the property held by the defendant Sarah Eames passed to the trustees named in said deed of trust on delivery thereof at the time of the date; that her indebtedness at that time exceeded the amount of her personal property; that the property now remaining in the hands of the defendant Kirkland, as such trustee, does not equal in value the real estate that passed under such deed of trust; that there is a perpetual annuity of $250 charged upon the trust property now remaining, payable to St. Stephen's Church, subject to which the trustee holds the funds; that the trust property now amounts, of personal, to about $4,750, and of real estate to about $6,000; and that the persons named in the trust deed for whom provision is there made, are some of them living, and some are infants.

The judge found, from the foregoing facts, as conclusions of law: 1st. The complaint in this cause assumes the validity of the assignment from Mrs. Eames to the defendant. 2d. By the trust deed Mrs. Eames became divested of all interest in the trust property, and the entire title passed to the trustees, subject to the trusts therein expressed: first, to pay the debts there existing; second, to apply the income to the support of Mrs. Eames during life; third, remainder to children and heirs of Mrs. Eames. 3d. The debt for which this action was brought did not exist at the time of the execution of the trust deed, but accrued in 1854, upon the dissolution of the company. 4th. It does not, therefore, come within the purpose of any of the trusts contained in the trust deed. 5th. There is, therefore, no equitable reason why the capital of the trust funds, which in equity belong to the children and heirs of Mrs. Eames, should be applied to the payment of the debt.

The record states that the plaintiffs excepted "to each and to every one of the findings of fact, and of the findings of law by the court, and to each one separately."

The judge ordered that the complaint of the plaintiff be dismissed, with costs. Judgment being entered accordingly, the plaintiffs appealed to the General Term of the Supreme Court, when the judgment was affirmed. The plaintiffs appeal to this court.

F. Kernan, for the plaintiffs.

C. H. Doolittle, for the defendant.

WRIGHT, J. The general exception in the case, if it raises any legal question to be reviewed here, is the single one, whether the plaintiff's judgment against Mrs. Eames is a *debt* within the provisions of the trust deed, which the defendant Kirkland is bound to pay in the execution of the trust. Points, it is true, are now made that the deed is fraudulent and void as to the plaintiff's creditors of Mrs. Eames, and that in any view it was error to dismiss the complaint, as she had a valuable equitable interest in what remained of the trust property which the plaintiffs were entitled to; but in the complaint there was no allegation or pretense that the trust deed was for any reason fraudulent or invalid, or that Mrs. Eames had any interest in the trust property applicable to the payment of the plaintiff's debt, nor were there any facts found, or legal conclusions of the court, to which exception was taken, bringing up either point for review. The plaintiffs treat the trust deed as valid in their complaint, not seeking to impeach it, but claiming the benefit of it, as creditors of Mrs. Eames, within the scope of the trust; and the judgment demanded is that the trustee pay the plaintiffs' debt out of any trust funds in his hands, or transfer sufficient of the property to pay it. Instead of alleging in the complaint that the trust deed was void as to them, or intended to defraud creditors, the plaintiffs claimed a beneficial interest under it, and the pleading was not framed to reach any equitable interest of Mrs. Eames, if she had any, but to obtain payment of their debt from the funds or estate remaining in the hands of the trustee, on the ground that it was provided for in the deed.

It is a rule in chancery, not affected by the Code, that a party must recover according to the case made by his complaint, or not at all; "*secundem allegata*" as well as "*protata.*" No decree can be made in favor of a plaintiff on grounds not stated in his complaint, nor relief granted for matters not charged, although they may be apparent from some part of the pleadings and evidence. (*Kelsey* v. *Western*, 2 Comst., 506; *Ferguson* v. *Ferguson*, 2 id., 160; *Baily* v. *Rider*, 6 Seld., 363; *Thomas* v. *Carter*, 4 Barb., 265; *New York Protective Insurance Company* v. *National Insurance Company*, 20 Barb., 473.) If it be as is claimed, that the deed was void as against the plaintiff's judgment, for the reason that it was a conveyance by Mrs. Eames of her property in trust for her own use, or that it was made to hinder, delay, and defraud her creditors, these matters should have been alleged. Not being alleged in the pleading, no proof of them could properly be received, or no judgment predicated upon them. (*Chautauqua County Bank* v. *White*, 2 Seld., 236; *Baily* v. *Rider*, *supra.*) Most clearly, when a party claims the benefit of a trust conveyance, treating it as valid in his complaint, and nowhere seeking to impeach it, he is not entitled to any relief on the ground that it is void or fraudulent, or intended to defraud creditors; and this is so although it may appear to be fraudulent or void on the pleadings and evidence. (*Ontario Bank* v. *Root*, 3 Paige, 478.)

In *Barley* v. *Rider*, a judgment creditor sought to have certain lands applied in payment of his demand, on the ground that the purchase of them was in trust for the benefit of Rider, the judgment creditor. The answer asserted, and the evidence showed, that the purchase and investment made was not for the benefit of Rider, but for his children. The complaint had gone solely upon the ground that the judgment debtor was the equitable owner of the lands, they having been purchased by his direction and with his money, and the title taken and held for his use and benefit by two other defendants. This being disproved, and the trust shown, being not for the judgment debtor but for his children, the plaintiff attempted to shift his claim for relief,

contending that the investment of the sum of $1,500 by the judgment debtor, although in trust for his children, was intended to defraud his creditors then existing, or that should thereafter exist; that it was in the nature of a voluntary conveyance to defraud creditors, and was, therefore, void as to such creditors. But this court said that a sufficient answer to this was that the plaintiff had made no such case by his bill. The court say: "There is no allegation or suggestion in the bill that the investment made by Rider for the benefit of his children was voluntary or fraudulent as against his creditors. The only point which the bill attempts to put in issue in respect to these lands is, whether or not the purchase of them was in trust for the benefit of Rider; there is no allegation that if the character of the transaction was, in fact, nominally as set up by the defendants, that it was fraudulent. * * If his (the plaintiff's) rights depended upon the fact that the purchase and investment for the benefit of the children of Rider was fraudulent as against him, it should have been so alleged, for it is an invariable and universal rule of the Court of Chancery to found its decrees on some matter put in issue between the parties by the bill and answer. * * It makes no difference whether the defendant has by way of avoidance set up a distinct and independent fact, or merely denied the matters alleged in the bill. If the existence and truth of the facts thus set up by a defendant be controverted, the defendant must prove it, and the complainant may examine witnesses to disprove it; but when the fact set up by a defendant is made out, either by proof or the admission of the complainant, and destroys his title to relief, it is not admissible for the complainant, after the fact is made out, to impeach it on a ground not taken in his bill, and on a ground not arising from the issue between the parties. * * * If the complainant's rights depended upon showing that the creation and execution of the trust for the use and benefit of the children of William Rider was voluntary and fraudulent as against him, his course was plain. He should have amended his bill and stated the facts on which he meant to

impeach it. The defendants would have been required to answer such facts, and, if denied, it would then have been competent to have supported the allegations by proof. The rule is explicit and absolute that a party must recover in chancery according to the case made by his bill, or not at all." The doctrine of this case is in harmony with the law as it now exists, the Code providing that "the relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint; but, in any other case, the court may grant him any relief consistent with the case made by the complaint and embraced within the issue:" (Code, § 275.) In the present case, the only relief that could have been granted "consistent with the complaint and embraced within the issue" was to direct the payment of the plaintiff's judgment by the trustee as being a debt provided for in the trust deed itself. A decree setting aside the deed on the ground that it was fraudulent or void as against the plaintiffs, that they might subject the property in the hands of the defendant Kirkland to the payment of the judgment, would have been utterly inconsistent with the case made by the complaint, and wholly without any issue raised by the pleadings.

Looking, therefore, at the matters charged, the issues raised and tried, the facts found, the legal conclusions of the judge, and the exceptions to such conclusions, as has been stated, the only point for our consideration is whether the debt of the plaintiff was within the provisions of the deed of trust, which, in the performance of his duty, the defendant Kirkland was bound to pay. If it was not, the complaint was properly dismissed. On the contrary, if it was, as the trustee had sufficient of the trust property in his hands to pay it, the plaintiffs were entitled to judgment. The dismissal of the complaint, it is true, was not excepted to; but, as the judge evidently based his decision on the ground that the debt for which the action was brought did not come within the purpose of any of the trusts contained in the trust deed, if he was wrong in this, the error should lead to a reversal of the judgment.

Now, was the debt in suit embraced within the trust? The deed was executed and took effect on the 5th of September, 1853. It conveyed all the property, real and personal, of Mrs. Eames to the defendant Kirkland and Walter S. Eames (since dead), subject to certain trusts. Amongst these, and primarily, was to pay her just debts of every description, including those specified in the schedule annexed to the conveyance, and any others due from her not thus specified. This was undoubtedly a trust for the payment of all debts of the grantor contracted at the time of making the deed. The deed provided for no future debt, and the trustee was bound, by the terms of the trust, to pay only such debts as the grantor owed when the deed was executed. Where a deed of trust is made for the payment of debts, it extends only to debts contracted at its date. (1 Maddock's Ch., 554; Hill on Trustees, 339, 357.) The plaintiff's debt had no existence for more than twenty years subsequent to the creation of the trust, and then only became a debt against Mrs. Eames by force of the statute. She happened to be a stockholder in the Manchester Manufacturing Company at the time of its dissolution in 1854, which company then owed the plaintiff a debt, for which she became individually liable, the statute providing "that for all debts that shall be due and owing by the company at the time of its dissolution, the persons then composing such company shall be individually responsible to the extent of their respective shares of stock in the said company, and no further." (Act of March 22d, 1811, § 7.) Can this, then, be said to be a debt entitled to payment out of the trust estate, according to the terms of the deed of trust? It seems plain to me that it is not. It had no existence when the deed was executed, in any shape or against any one. The bank itself was not organized until long afterward. If it did not exist, Mrs. Eames could neither have owed it or been liable for it; certainly no liability of any kind to the plaintiffs, who, as well as the debt, then had no existence. The fact that Mrs. Eames, when the trust conveyance was executed, was a stockholder in a company authorized to contract debts in the future for which she might be liable by the law

of the land, did not make her then owe such future debts. That she then owned stock in the company created no liability, contingently or otherwise. The statute liability is upon those persons only who compose the company at the time of its dissolution. If the week before the dissolution Mrs. Eames had disposed of her stock, it will not be pretended that any liability would have attached to her in respect to the plaintiff's debt, or any other debt due and owing by the company. The fact that she held the stock of the company when she executed the trust deed has no bearing whatever on the question of her liability. A stockholder is not the guarantor of debts which the corporation may contract, nor is there any contract on his part, express or implied, to be responsible for its debts. It is only for a particular class of liabilities of the corporation, and upon a certain class of stockholders — those being such when it is dissolved — that any personal responsibility is imposed. The plaintiff's debt against the company became a debt against Mrs. Eames when the company was dissolved by force of the statute, not before.

If, then, at the time she executed the trust deed she was in no sense liable for or owed the plaintiffs the debt in question, there is no ground for claiming that it was a debt provided for in such conveyance. It is absurd to assume that the trust embraced the payment of a demand or liability that had no existence at its creation, and when it depended altogether upon a contingency in the future whether the grantor would ever become bound, and the contingency entirely under her control. If it were conceded that liabilities, contingent or otherwise, are provided for by the deed, it must be liabilities existing when the conveyance was executed, and for some existing thing, and to some one who could be secured. It should be at least such a demand as would entitle a party, under the provisions of the English bankrupt act, or our insolvent laws, to a share in the insolvent or bankrupt estate. There was no demand or liability in this case which could be proved under the bankrupt or insolvent laws, or on which any portion of the bankrupt or insolvent estate could be paid, when the deed was

executed, or for more than twenty years afterward. (*Young* v. *Winter*, 16 Com. Bench, 401; *Boorman* v. *Nash*, 9 Barn. & Cress., 145; *Wollop* v. *Ebers*, 1 B. & Ald., 698; *Ford* v. *Andrews*, 9 Wend., 312; *Mechanics' Bank* v. *Capron*, 17 Johns., 467; *Doolittle* v. *Southworth*, 3 Barb., 79; Hill on Trustees, 357.) Our statute provided that a discharge under the insolvent laws should be a bar to all debts of the insolvent, whether due or to become due, which existed at the time of the insolvent's assignment; yet, in *Ford* v. *Andrews* (*supra*) it was held that the demand of the accommodation indorser of the insolvent's note due before the assignment for money paid on the note after the discharge of the maker was obtained, was not barred by the discharge. So, also, it was held in *The Mechanics', etc., Bank* v. *Capron* (*supra*) that when the insolvent was indorser on a note not due when his petition was filed, his discharge was no bar to an action on the indorsement after he had been properly charged as indorser. Both of these cases are manifestly stronger than the present one. There was a debt in existence; a creditor to deal with; an amount fixed to be liable for; and the insolvent had contracted on a certain contingency, to be liable for a definite and existing debt. Here there was nothing of the kind at the date of the trust deed. It is impossible to conceive of a debt, demand or liability in respect to which it cannot be stated to whom it was owing, in whose favor it was incurred, what it was for when it was contracted, and when it matured. Yet none of these things could be stated in regard to the debt in suit at the execution of the deed. It became the debt of Mrs. Eames long afterward, not upon any contingent liability existing at the time of such execution, and subsequently becoming absolute, but because the statute had declared that the persons owning the stock of the Manchester Manufacturing Company at its dissolution should be individually responsible for the debts *then* due and owing by the corporation.

It cannot, therefore, be insisted, upon any reasonable construction of the deed of September, 1833, that the plaintiff's judgment is a debt within its provisions which the trustee is

bound to pay out of the trust property. That deed only provided for the payment of existing liabilities. The debts are to be paid *pro rata*, and it manifestly was not intended that the trustee should wait twenty years before he paid them, to see if some debts should not be contracted by the manufacturing company which it would be unable to pay. Had there not been sufficient assets to pay conceded debts, the trustee would not have been justified in returning any funds to pay debts like the plaintiff's that might possibly accrue on the dissolution of the corporation in an insolvent state. That is not the meaning of the deeds nor is the trust so expressed. It is expressed in these words: "To pay all my just *debts* of every description." "The intent and object of this clause being fully to secure the payment *of all debts due from* ME of whatsoever nature the same may be." What debts? Manifestly the debts contracted and owing by the grantor when the deed was executed, and no other. This is the legal construction, and there is no language extending the trust to the payment of liabilities of Mrs. Eames other than those then incurred and owing by her. Certainly a debt that she should subsequently contract or be made liable for by statute is not within the terms of the trust. I think, therefore, that the judge was right in the conclusion that the plaintiff's debt, not existing at the time of the execution of the trust deed, but accruing in 1854, upon the dissolution of the company, did not come within the purpose of any of the trusts contained in such deed.

This disposes of the appeal upon the ground on which the action was presented by the pleadings, and tried in the court below, viz.: assuming the trust deed to be valid, and claiming that the plaintiffs' judgment against Mrs. Eames was a liability provided for by it. As the debt in suit was not a debt within the provisions of the deed, no case was made entitling the plaintiffs to a judgment in their favor. Were the question, however, presented by the case, whether the plaintiffs were entitled to have the deed set aside and the property subjected to the payment of their judgment, on the ground of fraud, or because it was a conveyance of personal estate

reserving a use or benefit to the grantor, I should entertain an opinion adverse to the plaintiffs. Instead of being made with intent to defraud the creditors of Mrs. Eames, a primary object of the conveyance was to provide for the payment in full of all her debts. The plaintiffs were not her creditors at the time of the assignment, and there could have been no fraudulent intent respecting them. The statute condemns alienations of property made with intent to defraud creditors. As against them only it is declared the conveyance or assignment shall be void. (2 R. S., 137, § 1.) The plaintiffs, therefore, not being the creditors of Mrs. Eames when the conveyance or transfer was made, were not in a position to assail its validity on the ground of fraud. But it is claimed that the deed is void as against the plaintiffs, by another statute. This statute declares that "all deeds of gift, all conveyances, and all transfers or assignments, verbal or written, of goods, chattels or things in action, made in trust, for the use of the person making the same, shall be void as against the creditors, existing or subsequent, of such person." (2 R. S., 135, § 1.) The conveyance of 1833 was of the real and personal estate of Mrs. Eames, and after providing for the payment of her debts out of the trust property, in terms reserved the income of the surplus and as much of the capital as should be required for her maintenance and support during life. Because that this *use* was expressed in the deed, it is insisted that as against the plaintiffs, her *subsequent* creditors, it is void; and this without regard to any fraudulent intention. To this, various answers may be made. First, the conveyance was of both real and personal estate, and the former is not within or condemned by the statute. The trust as to the real estate, which constituted the bulk of the transfer, is unquestionably valid. Second, the statute only avoids conveyances, etc., of personal estate which are wholly to the use of the grantor. Third, if it were held to apply to transfers made for other objects, but containing a residuary interest or partial use for the debtor, the whole grant would not be void, but only so much of it as is not sustained by the valid purposes for which it was

made. The meaning of this statute (sometimes called the statute of personal uses) was fully considered in *Curtis* v. *Leavitt* (15 N. Y., 9). It was there held that it applies only to conveyances, etc., wholly or primarily for the use of the grantor, and not to instruments for other and active purposes, when the reservations are incidental and partial only; that if it can be applied to instruments executed for real and active purposes, such as to secure debts or procure money on loan, it avoids only so much of the grant as is not sustained by the valid purposes for which it was made. It does not avoid the entire instrument which contains the invalid use.

The judgment of the Supreme Court should be affirmed.

INGRAHAM, J. The justice before whom this case was tried found that the debt due to the plaintiffs, for which this action was brought, did not exist at the time of the execution of the trust deed in 1833, but accrued in 1854. The complaint does aver that the trust deed was illegal, but asks to have the debt paid out of the property in the hands of the trustees, on the allegation that Mrs. Eames, the grantor, was the holder of the stock on which the liability arose. It must, therefore, be considered as assuming the validity of the trust, and asking to be paid by the trustee on account of the presumed liability, from her being the owner of the stock at the time of the conveyance, or on the ground that the stock passed to the trustee by the conveyance, and therefore he was liable.

There can be no difficulty in disposing of the first ground, by the statements that no doubt existed at the time of the trust deed from Mrs. Eames to the plaintiffs. It is true she owned the stock then; and if the debt had been due then from the company to the plaintiffs it would have been provided for under the trust deed, but the debt was not created till nearly twenty years after the assignment was made. There was no liability existing at the time of the execution of the deed, and none for which the trustees could have been called on for payment. The deed was not intended to cover, and did not provide for, any not then existing indebtedness,

and not for debts to be incurred twenty years thereafter. It is idle to say that Mrs. Eames was then liable for a debt which was not contracted, and for which the principal debtor, the company, were not liable, and which had no existence till twenty years thereafter.

I think it is clear that the debt is not one contemplated by the trust deed, or one which the trustees could have paid out of the trust funds without violating the terms of the trust, and it is equally clear that there could be no relation back to the original liability of Mrs. Eames as a stockholder, so as to cover debts contracted by the company long after the trust deed was executed. It is, however, urged that the trustees are liable, as the owners of the stock under the trust deed, and as such owners they are indebted to the company.

I do not think the plaintiffs can now claim against the trustees, to recover for them, on the ground that they were the owners of the stock, and therefore liable. They have established, by their judgment against Mrs. Eames, that she was the owner. If the trustees were the owners of the stock, their liability should be enforced by an action at law, and not by a proceeding in equity. The whole claim here is based upon a judgment against Mrs. Eames. There is no proof that the trustees held any stock at the dissolution, nor any evidence sufficient to charge them with any indebtedness as such trustees. The whole theory of the complaint is that the trustees are liable as such for a debt due from Mrs. Eames, and not for a debt due from themselves.

It is suggested that the debt should be paid out of the income belonging to Mrs. Eames under the trust deed. The complaint does not contain the allegations necessary to make out such a claim, and, even if it did, I think there is no reason for allowing it in this case. The whole title to the property was in the trustees, subject to the trusts. The provision for her support was personal, not assignable, and not subject to debts subsequently incurred, and even that has ceased by her death.

The judgment should be affirmed.

DENIO, Ch. J. 1. A person free from debt may make a settlement of his estate for the benefit of his family, by conveying to them the whole interest to take effect in possession immediately, or the reversion to commence in possession at his death. So, if by the same deed he make a provision for the payment of all his debts out of the property settled, so that creditors are not and cannot be hindered and delayed, the beneficiaries named, other than Mrs. Eames, took a vested estate in reversion by this deed. The nominal consideration of one dollar raised a use and made it a good deed of bargain and sale, and vested the reversion immediately in the beneficiaries.

2. The fact that Mrs. Eames was a stockholder in the Manchester Manufacturing Company did not disable her from making the settlement. It is not possible that she could be considered a debtor until the plaintiffs' debt was contracted, if she could be at any time before the dissolution of the company; and there is no pretense that the debt on which the judgment was recovered was contracted prior to the conveyance to Kirkland and Eames. The case is very much like that of one entering into a copartnership, and committing the active management to the other copartners or to an agent. There is in such a case a liability to have debts contracted, which would render the new acting copartner a debtor, but he does not become such until a debt is actually contracted. Every person is liable to contract debts, and may create agencies under which debts binding him may be contracted, but until he has done so, or a debt has been actually contracted, he cannot make a conveyance which will be fraudulent against creditors, if he is under no other liability.

3. The plaintiff cannot therefore reach the interest of the persons upon whom the reverson was settled. I have said that the estate of the beneficiaries other than Mrs. Eames was a vested estate; and I think it was such. If, however, it was contingent on account of what is said respecting the law of descents and distribution, which should be in force at Mrs. Eames' death, it would make no difference in my conclusion as to the validity of the deed. A person may create

a contingent future estate as well as one vested in interest, if there is no illegal suspense of the power of alienation. The fact that there might be changes in the persons of the beneficiaries before the taking effect of the reversion in possession does not prevent the vesting, the rule being that if there be persons in existence in whom the estate would vest in possession if the preceding estate should now terminate the latent estate is a vested one.

4. The remaining question is whether the plaintiff is entitled to sequester the rents and profits payable to Mrs. Eames during her life, to satisfy its judgment. In determining this we must consider the subject as wholly real estate. It originally consisted of both real and personal, but the latter has been appropriated to the payment of debts provided for in the trust deed. There is no direction in the deed to convert the real into personal, and the doctrine of equitable conversion has therefore no application. The securities now in the hands of the defendants are the proceeds of real estate sold, and are, therefore, so far as this question is concerned, to be considered real. At common law, I have no doubt that a conveyance of one's estate to trustees, reserving the income to the grantee for life, would render that income subject to the pursuit of creditors. It is against general principles that one should hold property or a beneficial interest in property, by such a title that creditors cannot touch it. But our statute expressly permits such arrangements, where there is a valid trust, under the fifty-fifth section of an article concerning uses and trusts. It declares that no person beneficially interested in a trust for the receipt of the rents and profits of lands, can assign or in any manner dispose of, such interest, etc. (1 R. S., 730, § 63.) This is not limited, like sections 18, 19, in the statute respecting the jurisdiction of the Court of Chancery, to trusts proceeding from another person. If the beneficiary cannot directly dispose of his interest, it is plain that he cannot by contracting debts put it in the power of another person to take and convert it so as to deprive the beneficiary of it. I have elsewhere stated what I conceive the motive of this peculiar exemption

to have been; but that whatever the system was upon which it was enacted, the courts are bound to execute the will of the legislature. (*Graff* v. *Bennett*, Dec. Term, 1864.) I am of opinion that the rents and profits of this trust property can no more be reached than the capital.

5. It has been argued that inasmuch as this stock in the manufacturing company passed to the defendants, the trustees, by the trust conveyance, the other trust property should be chargeable with this debt. Passing by other objections which might be urged against this view, it is enough to say that the plaintiff has no judgment against the trustees. He has elected to consider Mrs. Eames as the stockholder who is liable for the debt, and is therefore estopped from taking the ground that the trustees were the stockholders.

It follows from what has been said that the judgment of the Supreme Court is right and ought to be affirmed.

Judgment affirmed.

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